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Supreme Court of the United States

OCTOBER TERM 1977

77-1700

WESTPORT TAXI SERVICE, INC.,
MICHAEL AND ANTHONY GILBERTIE, *Petitioners,*

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, WESTPORT TRANSIT DISTRICT, PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Westport Taxi Service, Inc., Michael Gilbertie and Anthony Gilbertie pray that a writ of certiorari issue to review that portion of the opinion and judgment of the United States Court of Appeals for the Second Circuit, entered January 24, 1978, affirming, in part, the judgment of the United States District Court for the District of Connecticut which denied petitioners' action to enjoin the implementation of a demonstration grant funding a municipal taxi service financed under the Urban Mass Transportation Act of 1964.

OPINIONS BELOW

Petitioners' complaint for preliminary and permanent injunctive relief was originally denied by the United States District Court for the District of Connecticut in an unreported opinion [App. A, p. A-1-A-17], entered on April 13, 1977. This decision was affirmed in part, reversed in part, and remanded with instructions by the United States Court of Appeals for the Second Circuit in an opinion [App. B, p. A-18-A-30] reported at 571 F.2d 697 (1978), rehearing denied on February 28, 1978 [App. C, p. A-31].

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1978, and petitioners' timely motion for rehearing was denied on February 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner Westport Taxi Service, Inc., a private taxi company consisting of five taxi cabs owned and operated by brothers Michael and Anthony Gilbertie under a certificate of public convenience from the State of Connecticut, brought this action for an injunction, declaratory judgment and other relief as a result of the decision of the respondent Secretary of Transportation awarding a $610,000.00 "demonstration" grant, pursuant to the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.* [The Act] to respondent Westport Transit District, a municipal transit body, for implementation of a federally subsidized municipal taxi service.

The respondent Transit District is utilizing the grant to finance the operating costs and capital expenditures of a shared-ride taxi service in Westport, Connecticut. The Transit District's municipal taxi service directly competes with petititioners' business, offering essentially the same services. Section 1602(e) of the Act explicitly prohibits federal funding to a local public body for creation of mass transportation services "in competition with, or supplementary to" the services provided by an existing "mass transportation company" unless the Secretary of Transportation makes findings that, among other things, the program provides to the maximum extent feasible for the participation of existing private mass transportation companies or that such existing companies are compensated for any acquisition of their property, as required by applicable state and local law. 49 U.S.C. §1602(e). The Secretary of Transportation did not make these findings, nor did The Transit District include participation by petitioners' taxi service in its federally funded municipal taxi service.

The court of appeals held that §1602(e) findings under the Act were not required because petitioners' taxi company was not a "mass transportation company" within the meaning of the Act.

The questions presented are:

1. Whether petitioners' taxi service is a company engaged in "mass transportation," which is defined under the Act as "transportation by bus, rail or other conveyance, either publicly or privately owned, which provides general or special services (excluding school buses or charter of sightseeing services) on a regular and continuing basis," thereby requiring administrative findings pursuant to §1602e of the Urban Mass Transportation Act?

2. Whether the implementation of a federally funded competitive municipal taxi service, without findings pursuant to 49 U.S.C. §1602(e), violates petitioners' federal statutory right to be free of "unlawful" competition and therefore constitutes a taking by the Federal Government and the Westport Transit District without just compensation in violation of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

Constitution of the United States, Amendment XIV, §1:

". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ."

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

49 U.S.C. §1602(d)

Any application for a grant or loan under this chapter to finance the acquisition, construction, reconstruction or improvement of facilities or equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant —

(1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social or environmental interest in the matter requests a hearing;

(2) has considered the economic and social effects of the project and its impact on the environment; and

(3) has found that the project is consistent with official plans for the comprehensive development of the urban area.

Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

49 U.S.C. §1602(e)

(e) No financial assistance shall be provided under this chapter to any state or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass trans-

portation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of Section 1609(c) of this title.

Connecticut General Statute §7-273e:

[Acquisition or establishment of transit system and transportation center by district. Eminent domain]

(a) If the directors deem it necessary to preserve or to develop a transit system, the district may establish, operate and maintain a transit system within the district or between the district and any municipality contiguous with its service area with which it contracts to furnish transit service, and for this purpose may establish a new system, or may acquire all or a portion of the property and franchises of any company or companies operating a transit service in the district, including that portion of the property and franchise which is used outside the district but which is integrated into the service provided in the district. The district may establish, construct, acquire, operate and maintain a transportation center, as defined in subsection (b) of section 7-273b, in the district, and for such purposes may acquire, by purchase or otherwise, hold, sell, convey and obtain and exercise any and all

rights of ownership or interest in or to any real or personal property as provided by this section, apply for and accept grants and gifts, lease all or any portion of such center, charge and collect rent, use or other fees, make contracts and enter into management agreements and arrangements with others with respect to any transaction, operation or venture which the district has the power to conduct by itself in connection with exercising its powers under this section. Thereafter the district may contract, after competitive bidding, for the operation of all or any portion of the system and any transportation center located therein by private management, under suitable incentives. The district shall fix the terms and conditions upon which transit services shall be provided, whether operated directly by the district or indirectly by contract, including the fixing of passenger fares and any other rates to be charged. The district shall, for its purposes under this section, so far as applicable, have the authority conferred on the public utilities control authority by the general statutes as applied to local transit.

(b) In order to insure the continuance of adequate transit services when it appears that the holder of the franchise is or will be incapable of continuing to offer satisfactory service to meet present or future public passenger transportation requirements and it is improbable that such franchise will be sought by any other private concern, the public utilities control authority, on its own initiative, may or, on request of the transit district or the legislative body of one or more municipalities in the area served, shall fix a time and place for a hearing as to whether such franchise is suitable for acquisition by a transit district. Said au-

thority shall give written notice of such hearing to the board of selectmen of each town, or in the case of cities and boroughs to the chief executive of each, within the area not less than fourteen days prior to such hearing, and shall cause to be published twice, not more than fourteen nor less than seven days prior to such hearing, notice of such hearing in a newspaper or newspapers having a substantial circulation in each municipality within such area. Suitability of a franchise for acquisition by a transit district shall be determined from the following considerations:

(1) That public convenience and necessity require the continuance of transit service within the area,

(2) that the present franchise holder is or will be incapable of continuing to offer satisfactory service,

(3) that it is improbable that such franchise will be sought by a private concern and

(4) that continuance of transit service may require the operation of such service by a transit district.

After a public hearing thereon and consideration of the above-mentioned factors, the public utilities control authority may declare such franchise suitable for acquisition by a transit district, provided such declaration shall not affect the authority of the municipalities in the area to establish such a district. Ability to offer satisfactory service shall be based upon the financial stability of the franchise holder as determined from past, current and projected net income and from an estimate of financial ability to meet future public passenger transportation requirements in the area. The public utilities control authority may

make periodic inspections of transit system franchise holders to determine the financial stability of each and for this purpose may examine the books, accounts and other pertinent documents by the issuance of a subpoena.

(c) A transit district shall have the power to acquire real property and interests and rights in real property by eminent domain in the name of the transit district for the purposes of the transit district subject to the prior approval of the legislative body or bodies of the municipality or municipalities in which the real property is located. The owner shall be paid by the transit district for all damages. Where the transit district and the owner of such property cannot agree upon the amount to be paid to the owner for any property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive. Where the public utilities control authority has determined that a franchise is suitable for acquisition pursuant to subsection (b) of this section, the transit district shall have the power to acquire by eminent domain all or any part of the franchise and of the holder's transit system, including the holder's real estate or interests therein, personal property, and funds under the control or held for the use of or the benefit of such holder. Where the the transit district and the holder of such franchise and property cannot agree upon the amount to be paid to the holder for any franchise or property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive.
(1975, P.A. 75-486, §25, eff. Dec. 1, 1975; 1977, P.A. 77-463, §2.)

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Petitioners Michael and Anthony Gilbertie own and operate petitioner Westport Taxi Service, Inc., a private taxicab-business licensed by the Connecticut Public Utilities Control Authority to provide taxi service to the Westport, Connecticut area. Petitioners' father purchsed the business 22 years ago for $35,000.00, and the Gilbertie family has operated the business since.

In February 1976, respondent Westport Transit District, a municipal body of the Town of Westport, Connecticut, applied for federal funding from the Urban Mass Transportation Administration (UMTA) to establish a federally subsidized, municipally operated taxi service in the Westport area in direct competition with petitioners' business.

On June 29, 1976, UMTA approved a two-year demonstration grant to the Transit District in the amount of $610,000.00 for implementation of the proposed taxi system, which, at the time, included specific provisions for "premium" as well as "shared-ride" taxi service.[1] [UMTA approval of $610,000.00 grant, App. D, p. A-9; R.B. 25,* App. L, p.A-76] Only after this law suit was commenced, was the premium ride aspect removed from the UMTA funding.

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* References are to the trial testimony of Richard Bradley [R.B.], Executive Director of the Westport Transit District and Michael Gilbertie [M.G.], Vice-President of Westport Taxi Service, Inc.

1 "Shared ride," as used in this petition, describes a taxi service rendering service to two or more paying passengers traveling to different locations.

Although the grant was to be used to acquire equipment to compete directly with petitioners' exisitng taxi company, the UMTA approval did not contain findings by the Secretary of Transportation, as required under §1602(e) of the Act, that such financial assistance provided for participation to the maximum extent feasible of existing private mass transportation companies in the project or that just and adequate compensation would be paid under applicable state and local law for any taking of the mass transportation company's property or franchise rights. [UMTA approval of $610,000 Grant, App. D, p.A-9]

The Gilberties, but not Westport Taxi itself, were approached with the suggestion that they become employees of the district as dispatchers [R.B. 49, App. L, P.A-80]. However, no concrete offer was ever made to the Gilberties. The District made clear that Westport Taxi's operations would be superseded by the District's own "transportation company," and the District, not the Gilberties, would have ultimate responsibility for management and control of the project [R.B. 48, 50, App. L, p.A-81]. Thus, the District would have final control of rates, salaries and routes [R.B. 46-7 App. L, p.A-80]; the District would own all vehicles and equipment and contract for repairs [R.B.45 App. L, p.A-79]; the District would collect all revenues [R.B. 45, App. L, p.A-79]. The Gilberties would be deprived of their position as independent taxi operators, and their business would be effectively destroyed.[M.G. 80, App. M, p.A-86]. At no time did the

District offer to compensate the Gilberties for the diminution of the value of their existing franchise and its attendant good will. [M.G. 80, App. M, p.A-86; R.B. 49, A.. L, p. A-80]

At the time suit was commenced, Westport Taxi had a fleet of five taxi cabs serving Westport, Connecticut, a town of less than 30,000 people.[2] Petitioners' company provided premium or exclusive ride service as well as shared-ride service pursuant to Connecticut Public Utility Control Authority regulation section 16-319-15 which permits additional patrons to be carried with the consent of the first passenger.[3] Fifty percent of petitioners' business was derived from its "shared-ride" service [M.G. 28, App. M, p.A-84], and the District Court explicitly found that such shared-ride service constituted "a substantial portion of Westport Taxi's business. [App. A, p.A-2]."

The Transit District's project provides essentially the same services as were offered by petitioners' taxi service. These services are centrally radio dispatched, door-to-door taxi service for one or more passengers at any given time. The Transit District's taxis, however, do not require the permission of the first passenger to take on additional passengers.

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[2] The petitioners suspended operation as a taxi service on May 6, 1978, during the remaining period of the operation of the Westport Transit District's Taxi Service.

[3] The regulation provides:
Sec. 16-319-15, **Order of Service.**
The operator of a taxicab shall accommodate patrons in the order of their application for service. Consent of the first patron hiring the taxicab shall be obtained if additional patrons are to be carried.

The District's municipal taxi service was designed to compete directly with petitioners' business, offering equivalent taxi service at identical locations throughout Westport, with a greater number of taxis than were previously offered by Westport's two then-existing private taxi companies combined. [R.B. 30-37, 45, App. L, p.A-77-A-80]. Directors of the project estimated annual revenue for the two demonstration years at $127,000.00 and $182,000.00 respectively [R.B. 37, App. L, p.A-78], and acknowledged at the time of the hearing below that the Westport area generated only $200,000.00 per year in taxi revenues for both existing companies. [R.B. 38, App. L, p.A-78].[4]

The $610,000.00 federal demonstration grant was utilized to purchase eleven new twelve-passenger taxi vans ("Maxi-taxis") at a cost of over $150,000.00, the balance being utilized to pay operating expenses. The fare structure established by the Transit District was less than petitioners, and, were it not for the federal subsidies, the District would operate at a substantial loss. The rates of the Transit District are not subject to any state regulation, whereas petitioners' rates are controlled by the Connecticut Public Utilities Control Authority. Petitioners have not sought a rate increase since 1970 [M.G. 12, App. M, p.A-83.]

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[4] The grant sought by the District and approved by UMTA was for a two-year demonstration project, authorized pursuant to §1605 of the Act. Although the project was, thus, "officially" of limited duration, the Transit District made clear its intention to continue the project beyond the two-year demonstration period. Projections for a third year of service were included in the application [R.B. 54, App. L, p.A-81], and the District anticipated the project will be continued and expanded after the two-year period, with additional government subsidies, if necessary, [R.B. 53-54, App. L, p.A-81].

Petitioners' profit structure has been marginal for several years [M.G. 12, App. M, p.A-83], showing a small loss in the past two or three years after family salaries were deducted [M.G. 45-46 App. M, p.A-86]. The Gilbertie brothers have, for the past four years, been required to work seventy-five hours per week, drawing salaries of $10,500.00 each in 1975 [M.G. 42, App. M, p.A-85]. The Gilberties' eighty-one year old father worked full-time as a dispatcher for the company at the time of the district court hearing and drew one-half the salary of his sons [M.G. 29, App. M, p.A-82].

B. NATURE OF THE PROCEEDINGS

Petitioners initiated this action on December 6, 1976 in United States District Court for the District of Connecticut, seeking a preliminary and permanent injunction, a declaratory judgment, and other adequate relief based on the failure of the Secretary of Transportation and the Westport Transit District to comply with the mandatory requirements of §1602(d) and §1602(e) of the Act.

At the time suit was commenced, no formal agreement had been executed between the Secretary of Transportation and the Westport Transit District for appropriation of UMTA funds, nor had any vehicles or equipment been delivered to the District.

Petitioners' motion for temporary relief restraining the appropriation was denied on December 9, 1976, after a chambers conference, the court, Newman, J.,

concluding that no imminent irreparable harm mandated issuance of a temporary order. A prompt hearing on petitioners' request for preliminary relief was scheduled for January 11, 1977. On December 16, 1976, respondents executed a formal agreement for the appropriation. Thereafter, a hearing was held on January 11 and 12, 1977, at which the parties agreed that the evidence presented would also serve as the basis for a ruling on petitioners' request for permanent injunctive relief.

On March 29, 1977, petitioners, concerned by published reports that implementation of the project was imminent, reapplied for a temporary order to enjoin the project. The motion was again denied on April 5, 1977, the court indicating it would rule on the case prior to the announced April 16, 1977, starting date of the project.

On April 13, 1977, three days before commencement of the project, the district court denied petitioners' requests for preliminary and permanent injunctive relief. Judgment was rendered on April 18, 1977, and petitioners appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals heard argument on October 5, 1977 and rendered its decision on January 24, 1978, reversing the district court in part, affirming in part and remanding with instructions.[6] Petitioners' motion for a rehearing was denied on February 28, 1978.

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[6] Subsequent to the decision of the court of appeals, UMTA complied with the court's mandate in that it made the findings required under §1602(d) of the Act.

REASONS FOR GRANTING THE WRIT

This petition raises the question whether the provisions of Section 1602(e) of the Urban Mass Transportation Act of 1964 which protects "mass transportation companies" against federally subsidized competition are applicable to petitioners' small private taxi company.

The court of appeals (Meskill, J.) held that petitioners' company, which operated five taxi cabs on a "shared-ride" basis, did not come within the purview of the definition of "mass transportation."

It is petitioners' contention that the court of appeals' decision, which substantially restricts the statutory definition of "mass transportation," does not comport with Congress' expressed intent in two significant respects. First, Congress broadened the narrower definition of "mass transportation" in 1968 so as to allow the study, funding and protection of more extensive and innovative forms of transportation modes and systems which had previously been limited to fixed-route systems in the original 1964 definition. Secondly, the Urban Mass Transportation Act was conceived to provide federal funding for use by state and local bodies to improve the quality of mass transportation systems throughout the United States. The Act was not designed to promote public ownership of transit systems, but rather to "help existing private companies to remain in business and to improve the transportation services they offer." S. Rep. No. 82-83, 88th Cong., 2d Sess. See H.R. Rep. No. 204, 88th Cong., 2d Sess., reprinted in [1964] U.S. Cong. Code and Admin. News p. 2584.

a. THE DEFINITION OF "MASS TRANSPORTATION" WAS BROADENED TO INCLUDE THE PETITIONERS.

The original definition of "mass transportation" enacted by Congress when the Act was administered by the Department of Housing and Urban Development was limited to transportation traveling over prescribed routes:

> (5) the term "mass transportation" means transportation by bus or rail or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing service) and moving over prescribed routes.
>
> Pub. L. No. 88-365, §9(d)(5), 78 Stat. 302, 307 (1964). [49 U.S.C. §1608(c)(5), Rev. of 1964]

In 1968, approximately one month after Congress created the Department of Urban Mass Transportation within the Department of Transportation to administer the Act, it enlarged the scope and concept of the functions and systems included in "mass transportation" by substantially broadening the definition to its current form. The present definition eliminates any requirement that vehicles or systems move over prescribed routes and substituted the more general requirement that the transportation system be operated on "a regular and continuing basis:"

> (5) the term "mass transportation" means transportation by bus, rail or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or

charter or sightseeing service) on a regular and continuing basis.

Pub. L. No. 90-448, §702, 82 Stat. 476, 535 (1968); 49 U.S.C. §1608(c)(5), as amended.

The court of appeals' conclusion that Congress did not intend the amended definition to apply to conventional taxi service, *Westport Taxi Serv., Inc.* v. *Adams* 571 F.2d 697, 702 (1978), is unsupported by legislative history and ignores the express legislative goal to allow UMTA to explore all areas of urban mass transportation development. The stated congressional purpose of the change was, "to allow greater flexibility in developing and applying new concepts and systems in urban mass transportation programs." S. Rep. No. 90-1123, 90th Cong., 2d Sess. 76-77; see H.R. Rep. No. 1585, 90th Cong., 2d Sess. 65-66, reprinted in [1968] U.S. Code Cong. & Admin. News, pp. 2873, 2940-41. The court expressly recognized that the present definition would include petitioners' company, but found that the petitioners' taxi service was not a "new" concept and thus not encompassed within the definition. *Id.*

The court's decision is inconsistent in that on the one hand petitioners' five-cab "shared-ride" company is held not a "mass transportation" company, while on the other hand the court approved federal funding of a municipal eleven-cab, shared-ride taxi company which provides the same service and by definition is required to be a "mass transportation" company to receive funds under the Act. *Id.*, at 701-2.

There is nothing contained in the amended definition of "mass transportation" nor in its legislative history which would give substance for the creation of

any distinction between the "shared-ride" service of the municipal taxi service and the "shared-ride" service provided by petitioners upon consent of the first passenger.

At the time of the hearing, petitioners were operating their five taxi cabs under a Public Utilities Control Authority Certificate which allowed them to carry more than one passenger going to different locations if they obtained the consent of the first passenger.[7] Petitioners' "shared-ride" service comprised fifty percent of the company's taxi business, [M.G. 28, App. M, p. 84] Its taxis were radio dispatched to the customers' homes, and it also performed pick-ups at central locations within Westport. Respondent Westport Transit District operates its eleven taxi cabs in the same manner, in that its radio dispatched cabs also pick up and deliver door-to-door. The only difference between the two services is that the Transit District need not get the permission of the first rider. However, the Transit District's taxis respond to all calls and thus at times operate for the benefit of only one passenger.

Respondents contended below that petitioners were not providing mass transportation because petitioners, under state regulation, were required to gain the permission of the first passenger before carrying further passengers. Petitioners' response is simply that it is a "mass transportation" company because fifty percent of its business was, in fact, on a shared multiple ride basis.

The Urban Mass Transit Administration is providing a "mass transportation" grant to the Westport

[7] See n.3, *supra.*

Transit District to provide door-to-door, radio dispatched, shared-ride taxi service within the Town of Westport. These were essentially the same services provided by Westport Taxi. Thus, if the federal funding of a municipal shared-ride taxi service is permitted under the Act as "mass transportation," then as a required corollary the protection of the Act must be extended to petitioners' private shared-ride taxi service. It was not Congress' intent to define "mass transportation" differently as to the criterion for grant as opposed to the criterion of protection of private companies.

If the court of appeals' interpretation of "mass transportation" is allowed to stand, the entire taxi industry of major cities such as New York City, which operates on an exclusive ride basis and carries thousands of passengers a day as a integral part of the nation's mass transportation system, would not be entitled to protection from federally subsidized, competitive public taxi services. Equally important, since, under the Act, UMTA assistance is limited to "mass transportation" projects, such taxi service could not be made subject of federal study or funding. Such a result is clearly contrary to the congressional intent.

The court of appeals ruled that although petitioners' exclusive and shared-ride services would seem to come within the statutory definition of "mass transportation," a contrary UMTA interpretation, contained in an adversary affidavit submitted during the course of this litigation, should prevail. The court relied heavily upon a purported agency interpretation of "mass transportation" excluding petitioners' premium and shared-ride services, from the definition of

"mass transportation," as contained in an affidavit prepared for the purpose of this litigation by UMTA official Charles F. Bingham. This affidavit [App. J] purports to make a distinction between petitioners' shared-ride service with permission of the first passenger and the municipal transit district's shared-ride service.[8]

While petitioners recognize the general rule that such an administrative interpretation is entitled to special weight, the law is clear that no such consideration need be given to the views of an administrator adopted during the course of adversary litigation if such views are inconsistent with prior administrative

[8] In his affidavit, Bingham alleged:

> UMTA has consistently included within [the] definition [of mass transportation] any form of collective transportation service which is regularly available to the public, i.e., any service which cannot be reserved for the private and for the private and exclusive use of particular individuals or private groups (certified copies of official correspondence expressing this interpretation are submitted as Exhibits "C" and "E" and made part of this Affidavit). Hence, fixed-route bus or rail services and paratransit services such as dial-a-ride, jitney, shared-ride taxi, neighborhood transit, subscription bus service and other types of shared-ride transportation services which are available to the public or to special categories of users (such as elderly and handicapped persons) on a regular basis are considered by UMTA to be "mass transportation services." Services which can be reserved for the exclusive use of individuals or private groups, either by the operator or the first patron's refusal to permit others to be picked up, such as exclusive-ride taxi service, charter services, sightseeing services, employer vanpool programs, car rental services, for-hire limousines and private ambulance service are not deemed to be "mass transportation" services for purposes of the UMTA Act.

positions. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858 n.25 (1975); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

In the case at bar, exactly such a situation exists. The trial affidavit submitted by UMTA and relied upon by the court of appeals is flatly contradicted by UMTA's earlier policy statements and practice followed prior to institution of this litigation.[9] Thus, for example, UMTA's policy statement on paratransit services, published in the Code of Federal Regulations, specifically recognizes that private taxi companies fall within the protections of §1602(e):

> PROTECTION OF EXISTING PRIVATE OPERATORS
>
> Provision of paratransit service will often be carried out most efficiently and effectively by private transportation companies. It is in the public interest not to foreclose private operators from engaging in the provision of paratransit services where such private operators are willing and able to provide this service. Pursuant to this policy and to Section 3(e) [§1602(e)] and 4(a) [1602a] of the Act, UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by an existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies (whether or not such companies are providing at the time mass transportation services). [App. F, p. A-41-A-47 (*See* C.F.R. 46412, 46413)]

Significantly, the language of this policy statement is plainly drawn from §1602e, inserting the phrase " existing local taxi operator" for the statutory phrase "mass transportation company."

The position expressed in UMTA's policy statement was reiterated in a letter of July 12, 1976 (prior to institution of this action) by Robert E. Patricelli, Administrator of UMTA, to Bill R. Stokes, Executive Director of the American Public Transit Association, in which Patricelli stated:

> [S]pecifically, local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded a fair and timely opportunity to participate in the planning of community-level paratransit services and special services for elderly and handicapped persons developed pursuant to DOT Regulations for Transportation for Elderly and

---

[9] In the district court proceedings, in response to the government's submission of Bingham's affidavit, petitioners moved to depose Charles F. Bingham and James Bautz of UMTA to establish UMTA policy and past practice in interpreting §1602e. The federal defendant moved for a protective order quashing the notice of deposition, and this motion was granted by the district court on January 11, 1977. The ground, inter alia, cited by the government in its Motion to Quash was that the depositions were "unnecessary for a resolution of the issues of this case." [*See* Record, Dist. Ct Proceedings, Jan. 11, 1977 (order granting motion for protective order)]

The district court did not attempt to resolve the factual issue of UMTA's actual policy because of its determination of the issues against petitioners on grounds held erroneous by the court of appeals.

> Handicapped Persons (49 CFR 613.204). Local private carriers must also be given an opportunity to recommend the inclusion of private paratransit services in the annual element of the Transportation Improvement Program.
>
> Local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded full opportunity to bid for the provision of any general or special paratransit services proposed for implementation with the assistance of Federal Funds.

Patricelli specifically noted that compliance with this policy would be accomplished through the §1602 review procedures:

> Compliance with the above policy will be ensured by UMTA through a review of the annual element of the Transportation Program, and of individual paratransit project applications for Section 3[§1602], 5 and 16(b) grants. [App. E, p. A-37-A-40]

The policy statement was also repeated verbatim in an article by C. Kenneth Orski, Associate Administrator for Policy and Program Development of UMTA, written for a taxi trade magazine, *Taxicab Management*, "UMTA's View of the Role of Taxicabs in Public Transportation," p. 1, 13 (November 1976) [App. G, p. A-48-A-56].

James Bautz, head of UMTA's Paratransit Demonstrations Divisions and liason with the taxicab industry, has similarly made clear that

> ". . . local taxi operators and other private carriers must be afforded a fair and timely opportunity to participate in the planning of

> community level and special transit service development of the local transportation plan. UMTA will not provide financial assistance to support public paratransit services in competition with similar private services unless honest efforts are made to involve private operators as providers of paratransit services."
>
> Bautz, *Taxicab Management*, "UMTA's Current Involvement with the Taxicab Industry," p. 11, 13 (February 1977) [App. H, p. A-57—A-67]

In analyzing the agency's actual policies, it is significant to note that UMTA has, in fact, in the past given financial assistance under the Act to private taxi companies for exclusive ride services. *Westport Taxi Service, Inc.* v. *Adams, supra*, at 703 n.5. In addition, Bautz' article makes specific reference to numerous projects funded by UMTA involving exclusive as well as shared-ride taxi service, in direct contradiction of Bingham's affidavit. Bautz, *op. cit.*, at p. 161 (*i.e.*, purchase of 66 diesel taxis, funding of feeder service for exclusive ride).

While the court of appeals sought to minimize the extent of this funding, this action by UMTA plainly manifests the inconsistency of its prior administrative interpretation of the Act with that asserted in Bingham's affidavit.

Thus, UMTA's own policies and grants prior to this litigation clearly reveal a policy to protect and deal with private taxi owners and clearly place petitioners within the ambit of §1602(e) of the Act. In view of the unexplained contradiction between Bingham's adver-

sary affidavit and UMTA's past policy and practice, the court of appeals improperly relied upon Bingham's affidavit. *United Housing Foundation, Inc.* v. *Forman, supra.*

In viewing the agency policies, it must also be noted that the jurisdiction and authority of the Urban Mass Transportation Administration are limited and controlled by the definition of "mass transportation." The agency has taken the position that it has wide ranging authority to fund and study forms of transportation which are not usually conceived as mass transportation. Thus, the agency, in its administrative role, has in practice asserted broad authority over diverse forms of transportation. It is estopped from now attempting to limit its interpretation of "mass transportation" in determining which companies should receive the benefits of the Act's protections.

b. THE ACT WAS DESIGNED TO PROTECT PRIVATE ENTERPRISE TAXI COMPANIES AGAINST UNLAWFUL FEDERALLY FUNDED COMPETITION.

It is petitioners' position that the definition of mass transportation is clearly intended to promote the development of systems which foster the continuation of private taxi companies like petitioners'.

The legislative history of the Act indicates that Congress clearly intended to assist private enterprise to continue to operate in the mass transportation field and to protect private transportation companies against destruction resulting from competitive federal

funding.[10] The Act was designed not to promote public ownership of transit systems but, rather, to, "help existing private companies to stay in business and to improve the transportation services they offer." S. Rep. and H. Rep. 88th Cong. 2nd Sess., *supra*, at 2584.

I.T.N.10

This purpose is well revealed by the legislative history:

In order to insure the maximum participation of existing private transit companies in federal projects and compensation to such companies for any federally-funded acquisition of their property or franchise interests, Congress carefully specified that, "[n]o financial assistance shall be provided under this Act" for a project that competes with an existing mass transportation company, unless the Secretary of Transportation finds that the proposed project will (1) insure the maximum participation of existing companies in the project and (2) provide adequate compensation, under applicable state or local law, for any taking of equipment or franchise interests occurring as a result of the project. 49 U.S.C. §1602e.

---

[10] This purpose is well revealed by the legislative history:

> With respect to public ownership and operation the committee believes that existing private companies will be acquired in only a few cases. It has been pointed out that existing private transportation companies are to participate in the assistance provided by this bill. It is not the intent of this legislation to promote public ownership of urban transportation systems, or to eliminate or curtail collective bargaining rights. S. Rep. and H. Rep. 88th Cong. 2nd Sess., *supra*, 2583
>
> Mass transit facilities and equipment already being used in the urban area could be acquired only if the program provides for their improvement so that they will

The Secretary's failure to make the findings required by §1602e prior to approving the Westport Transit District grant reflects more than a mere technical violation of the Act. Contrary to the legislative goal of improving existing private transit service, the District's application for UMTA funding, as approved by UMTA, explicitly indicated the District's intention to eliminate the two private taxi companies in Westport and establish, in their place, under the control and supervision of the Transit District, a new municipal taxi company [*See* Record, Application of Westport Transit District for UMTA grant, January 31, 1976, pp. A-19-22].

While, under the proposal, it was conceived that the Gilberties would be employed as dispatchers [*id.*, at A-19-20], they would have been required to surrender their corporate identity and independence. The District, not petitioners, would own all vehicles, would be responsible for establishing routes, salaries and fare structures, and would collect and control revenues. The petitioners' private taxi company would cease to exist, and petitioners, independent businessmen for the past 22 years, would become employees of the Transit District.

Furthermore, in the event that petitioners attempted to continue private taxi operations, the District's application explicitly provided for elimination of petitioners' present franchise right to provide shared-ride service.[11] Although such service constitutes a "substantial portion of Westport Taxi's

better serve the transportation needs of the area. *Id.*, at 2586.

[11] *See* Record, Application of Westport Transit District for UMTA grant January 31, 1976, p. B-2.

Under existing Connecticut P.U.C.A. regulations [§16-319-15], petitioners are permitted to provide shared-ride service with the consent of the first passenger.

business" [App. A, p. A-4], furnishing over fifty per cent of petitioners' revenue [M.G. 22, App. M, p. A-83], no provision was made for compensation to petitioners for the taking of this part of their franchise or for the inevitable decrease in their revenue. Contrary to the requirements of 1602e(3), state laws applicable to acquisition by a transit district of franchise interests were not followed. See 7-273e, Connecticut General Statutes. Rather, under the proposal, petitioners were simply to be left with diminished rights of service and diminished compensation, with the inevitable result that petitioners would be put out of business. [M.G. 22, App. M, p. A-83] See *Westport Taxi Serv., Inc.* v. *Adams, supra.*, at 700.

Such public ownership and control of Westport's transit services and the concommitant elimination of the existing private operators as independent transit entities are precisely contrary to the stated goals of the Act to promote and improve existing private transit companies and to limit public assumption of transit service. The Act requires the maximum participation of private transit companies so that, through federal funding, such companies will ultimately be able to provide full service without subsidy, seeking to insure that transit services continue to be provided by existing private, rather than new public entities. The Act is completely frustrated if existing private companies are effectively eliminated by a superseding public entity, even if the management and staff of the private companies are offered employment by the municipality. As Congress explicitly noted:

> [I]t is not the intent of this legislation to promote public ownership of urban

> transportation systems. . . . The bill would help existing private companies to remain in business and to improve the transportation systems they offer. S. Rep. No. 82-83, 88th Cong., 2d Sess., see H.R. Rep. No. 1585, 88th Cong., 2d Sess., reprinted in [1964] U.S. Cong. Code and Admin. News pp. 2583-2584.

Petitioners thus sought in the district court to enjoin the Transit District and its directors from implementing the proposed project, contending that such direct competition with petitioners' business by local authorities acting under color of law constituted an infringement and taking of the property interest inherent to petitioners' state taxi franchise, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Although recongnizing the general proposition that there is no constitutional right to be free from lawful governmental competition, *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939); but *compare Frost* v. *Corporation Commisson*, 278 U.S. 515 (1929); *see Wells Fargo Armored Service Corp.* v. *George Public Service Commission*, 547 F.2d 938, 940 n.2 (5th Cir. 1977), petitioners contended that §1602(e) of the Act confers upon them a federal statutory right, enforceable through 42 U.S.C. §1983, to be free from UMTA-funded competitive taxi sevices absent compliance with §1602(e) of the Act. *See Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968).

In *Hardin* v. *Kentucky Utilities Co., supra*, this Court held that Congress may enact statutes creating legal rights, the invasion of which is judicially reviewable, even though no protected interest would exist without the statute. In *Hardin*, the right created was a public utility's right, under the Tennessee Valley Authority Act, to be free from competition by the Authority in areas prohibited by the Act. Although the Court ultimately rejected the utility's interpretation of the areas in which the Authority could lawfully compete, the Court made clear that had the Authority competed improperly, injunctive relief would lie.

Since *Hardin*, the Court has also made clear that interference by state or local officials with a federally created statutory right may be enjoined under the Civil Rights Act, 42 U.S.C. §1983, invoked by petitioners below. *O'Shea* v. *Littleton*, 414 U.S. 488, 492 n.2 1974; *cf.*, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972). There is similarly no question that petitioners' attempt to enjoin the deprivation, without compensation, of a federally protected property interest by local authorities acting under court of law is cognizable under the Civil Rights Act. *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 552 (1972).

The court of appeals declined to find the existence of any federal statutory right conferred upon petitioners by §1602(e) because of its conclusion that petitioners' company is not a "mass transportation company" and thus is not protected by the statute. Because, for the reasons stated above, that conclusion was erroneous, the court of appeals also erred in concluding that no federal statutory right existed, and its opinion must be overturned.

CONCLUSION

The definiton of "mass transportation" and its legislative history give UMTA wide latitude in funding transportation programs and services. However, this

wide latitude also imposes on the agency the requirement to protect private taxi companies that are rendering the same types of transportation services as those federally funded under the Act.

UMTA has failed to fulfill its obligations under the Act to protect and promote existing private transit companies in the Westport area. The holding of the court of appeals approving UMTA's actions threatens not only the existence of petitioners' business, but the continued vitality, under the Act, of private taxi companies throughout the nation. The court of appeals' holding takes on extreme importance, especially in light of UMTA's stated intention to fund para-transit projects involving taxi services throughout the country. [App. F, p. A-46] The purpose of the Act was to improve the private transportation sector, not to put the government in the taxi business.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

We, Richard A. Silver and David S. Golub, Attorneys for the Petitioners, certify that a copy of the foregoing Petition was mailed, via U. S. Mail, postage prepaid, this 26th day of May, 1978, to the following attorneys of record: U. S. Attorney, 20 Orange Street, New Haven, Connecticut 06508; Glenn F. Wasserman, Attorney Advisor, Urban Mass Transportation Administration, 407th Street, S.W. Washington, D.C. 20590; Richard Berkowitz, Esquire, 136 Main Street, Westport, Connecticut; J. Daniel Sagarin, Esquire, 855 Main Street, Bridgeport, Connecticut.

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DAVID S. GOLUB

Supreme Court, U. S.
FILED
MAY 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

77-1700

WESTPORT TAXI SERVICE, INC.,
MICHAEL AND ANTHONY GILBERTIE, *Petitioners,*

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, WESTPORT TRANSIT DISTRICT, PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY, *Respondents.*

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WESTPORT TAXI SERVICE, INC., ET AL

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL. } CIVIL NO. B-76-369

RULING ON MOTIONS

Plaintiff Westport Taxi Service, Inc. ("Westport Taxi") is a private taxi company owned by plaintiffs Michael and Anthony Gilbertie and operated by the Gilberties in the Town of Westport under a Certificate of Public Convenience and Necessity from the Connecticut Public Utilities Control Authority ("PUCA"). Plaintiffs bring this action to challenge the implementation by the defendant Westport Transit District ("Transit District") of a municipal taxi service as part of an experimental suburban mass transportation plan to be supported in part by a grant of federal fund under the Urban Mass Transportation Act, 49 U.S.C. §1601 *et seq.* ("UMTA"). The other defendants in addition to the Transit District are the Secretary of Transportation of the United States and the directors of the Westport Transit District. The complaint alleges various violations of the provisions of UMTA in the decision to award federal financial assistance to the Westport project and asserts that the failure to

compensate Westport Taxi for the losses it will incur from competition from the project constitutes a taking of property without just compensation in violation of UMTA and of the Fifth and Fourteenth Amendments to the United States Constitution.

The plaintiffs have moved for a temporary restraining order and for a preliminary injunction. Defendants have moved to dismiss and for summary judgment. An evidentiary hearing was held. After the close of the hearing the plaintiffs advised the Court that because they had no further evidence to submit on the merits, the hearing on the injunction could be deemed the hearing on the merits. Fed. R. Civ. P. 65(a). This memorandum will thus dispose of all the claims made by the parties.

I. Standing

All defendants argue that plaintiffs have no standing under UMTA to maintain this suit. They begin with the Supreme Court's interpretation in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), of the provision of the Administrative Procedure Act for judicial review of agency action, 5. U.S.C. § 702.[1] In *Data Processing* the Court set forth a two-pronged test for standing to challenge agency action. The first prong is met if the complainant alleges injury in fact, economic or otherwise. The second is met if the interest sought to be protected by the complainant is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

Both of these tests are satisfied in the present case. The complaint adequately alleges concrete economic

injury to the plaintiffs from the defendants' actions in the form of a decrease in operating revenues and profits so severe that the plaintiffs may be forced out of business. Whether this injury is real, as the plaintiffs claim or speculative, as the defendants claim, is a question relating to the merits and not to standing. 397 U.S. at 153, 156.

With respect to the second prong of the test, that the interest invoked be *"arguably* within the zone of interests" protected by the statute in question,[2] *Data Processing* effectively puts to rest defendants' claim that plaintiffs have no standing to challenge agency action benefiting a competing provider of transportation services. *Data Processing* itself was a competition case, in which data processors were held to have standing to challenge a ruling of the Comptroller of the Currency allowing banks to provide data processing services in competition with the plaintiffs in alleged violation of a statute restricting bank activities to the performance of bank services. See also *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971); *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969). As the Supreme Court stated in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968), "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.[3]

In enacting UMTA, Congress manifested a concern for private transit operators by requiring the Secretary of Transportation to make a finding for each program to receive assistance under the Act "that such program, to the maximum extent feasible, pro-

vides for the participation of private mass transportation companies." 49 U.S.C. §1602. This provision brings "private mass transportation companies" within the zone of protected interests under the *Data Processing* test.[4]

Plaintiffs argue that Westport Taxi is a "private mass transportation company" within the meaning of UMTA. The statutory definition of "mass transportation" is found in 49 U.S.C. §1608(c)(5), which defines the term to mean

> transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special services (but not including school buses or charter or sightseeing service) on a regular and continuing basis.

Defendants argue that the fact that Westport Taxi offers "premium ride" or "exclusive ride" service -- that is, service that can be limited to the exclusive use of a single passenger or group -- takes the plaintiffs out of the zone of interests Congress intended to protect when it made special provision for "private mass transportation companies." While it may be true that Congress did not intend to subsidize exclusive ride services,[5] it is also true that this particular variety of transportation service is not the only service Westport Taxi provides. Rather, a substantial portion of Westport Taxi's business comes from its shared-ride service, under which passengers traveling in the same direction use the same cab if the initial passenger agrees to the sharing. As a private provider of one type of shared-ride service, albeit with the consent of the first rider, Westport Taxi is at least "arguably" within the zone of interests Congress sought to protect by paying special attention to private mass transportation companies.[6]

II. Demonstration Projects Under UMTA

The plaintiffs argue that the defendants failed to comply with UMTA in the following respects:

> a. in that the application fails to certify that the required hearings were held to determine the economic, social and environmental impact of the project (see 49 U.S.C. § 1602(d));
>
> b. in that the Secretary of Transportation did not, prior to approving the application, make a written finding that federal assistance under the Act is essential to the development of a coordinated and comprehensively planned transportation system (see 49 U.S.C. § 1602(e)(1));
>
> c. in that the Secretary did not make a written finding that the proposed program, to the maximum extent feasible, provides for the participation of private transportation companies (see 49 U.S.C. § 1602(e) (2));
>
> d. in that the Secretary did not make a written finding that just and adequate compensation will be paid to private transportation companies for the acquisition of their franchise interests, as required by applicable state law (see 49 U.S.C. §1602(e) (3)); and
>
> e. in that the Secretary also failed to comply with 49 U.S.C. §1610, which requires specific findings as to environmental impact.

Defendants respond that compliance with these statutory provisions is not required by UMTA, since the

challenged project is a demonstration project under 49 U.S.C. §1605(a), which provides:

> The Secretary is authorized to undertake research, development, and demonstration projects in all phases of urban mass transportation (including the development, testing, and demonstration of new facilities, equipment, techniques, and methods) which he determines will assist in the reduction of urban transportation needs, and improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation needs at minimum cost. He may undertake such projects independently or by grant or contract (including working agreements with other Federal departments and agencies). In carrying out the provisions of this section, the Secretary is authorized to request and receive such information or data as he deems appropriate from public or private sources.

It is clear from the Act itself and from its legislative history that demonstration projects need not comply with the requirements of §§1602(d) or 1610. Section 1610 by its very terms applies only to assistance provided pursuant to §1602 and not to a §1605 demonstration project. Section 1602(d) applies only where the grant or loan is to finance "the acquisition, construction, reconstruction, or improvement of facilities or equipment which will substantially affect a community or its mass transportation service." Although the challenged project will to some extent involve acquisition of equipment, I find that it is a demonstration project only and does not involve the more significant commitment of resources and more

substantial effect on the community necessary to bring the hearing and certification requirements of §1602(d) into play.[7] The Transit District and the Urban Mass Transportation Administration have at all times treated the application as one for a §1605 demonstration grant rather than for a grant under §1602. The exhibits introduced at the hearing, especially the Application of the Westport Transit District for a Service and Methods Demonstration Grant (Exhibit 1) and the Urban Mass Transportation Administration's approval of the demonstration grant application (Exhibit 2) clearly indicate the demonstration nature of the project, which is to have a two-year duration. Exhibit 2 specifically refers to the project as one authorized under § 6 (§ 1605) of the Act. The intent of the project is to experiment with model methods of providing a broad range of paratransit services. The cost estimates indicate that the bulk of the expenditures for the project will be non-capital rather than capital in nature. All these factors are persuasive that the project is one that may be implemented as a demonstration project under the flexible authorization of §1605 rather than the more strictly controlled requirements of § 1602(d).[8]

The remaining section relied upon by the plaintiffs, §1602(e), applies, *inter alia*, to assistance[9] provided "for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transporation company." This provision again raises the issue of whether Westport Taxi is a "mass transportation company" within the meaning of the Act, for if it is not, §1602 (e) would have no application. As noted *supra* at n.3 and accompanying text, Westport

Taxi's status under the Act is not entirely clear. It is unnecessary to resolve the issue (other than for standing purposes as discussed above), since the legislative history and administrative construction of the Act indicate that §1602(e) is inapplicable to §1605 demonstration projects.

It is clear from the legislative history of UMTA that Congress wanted to allow considerable flexibility in demonstration projects under the Act. See H.R. Rep. No. 204, 88th Cong., 2d Sess. (1964), 1964 U.S. Code Cong. & Admin. News 2569, 2579-80, 2583. Rather than mandating extensive hearings and findings as under other sections of the Act, Congress simply authorized the Secretary "to request and receive such information or data as he deems appropriate from public or private sources."

The Urban Mass Transporation Administration, charged with administering the Act, has consistently differentiated between §1602 projects and §1605 demonstration projects. Demonstration projects are exempted by UMTA regulation from review under Office of Management and Budget Revised Circular A-95 on Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects. 41 Fed. Reg. 10.316 (1976) (to be codified in 49 C.F.R.) §613.300 *et seq.* Section 61-306(a) (2) (iii) provides:

> Experimental studies or operational tests of techniques or concepts that are as yet unproven and which require further study or demonstration to determine if they should be encouraged on a national scale, undertaken under a section 6 [§ 1605] Demonstration Grant, are exempt from the requirements of this section.

Similarly, UMTA regulations on comprehensive transportation planning in urban areas do not apply to §1605 demonstration projects. See 23 C.F.R. §450.302(a). In light of this administrative construction, it would be inappropriate to hold the requirements of §1602(e) applicable to a §1605 demonstration project, since the §1602 (e) requirements, like the OMB Circular A-95 requirements and comprehensive transportation planning requirements, are safeguards designed to provide more careful control over the more substantial projects under §1602 rather than over the flexible and experimental projects funded under §1605.

Plaintiffs' allegation that defendants hope to transform the project into a permanent one after the expiration of the two-year demonstration grant does not change the fact that these funds were allocated under §1605 for demonstration purposes only. Every demonstration project is undertaken with the hope that its design will be replicated on a continuing basis in various locations. The fact that the locale of the demonstration may become one of the sites for a continuing project does not change the statutory requirements for demonstration grants.

III. Taking of Property

The plaintiffs argue that the implementation of the proposed municipal taxi service constitutes a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and §§ 1602 (e) and 1603 of UMTA. Their argument is that since they hold a certificate of public convenience and necessity from the Connecticut Public Utilities Control Authority

("PUCA") and are regulated by the PUCA, the Westport Transit District, which is authorized by Conn. Gen. Stat. § 7-273d to assume the regulatory powers of the PUCA in the Westport area, cannot set up a municipal taxi service in competition with the plaintiffs in the absence of either a finding that competition is necessary or an award of just and adequate compensation. They allege that the Westport Transit District has advised them of its intent to assume the powers of the PUCA and to eliminate the plaintiffs' present franchise right to operate a shared-ride service by issuing a limited operating certificate. The Transit District denies any such intention. Even if the Transit District actually intends at some point to deprive the plaintiffs of their franchise or certificate, there is no showing that the threat is in any way imminent. The pressing issue, given the announced date of April 16, 1977, for commencement of the Transit District's taxi operation, is only whether the defendants violate any constitutional or statutory right of the plaintiffs by setting up a competing taxi service with Federal Financing assistance.

The Transit District's intention to enter into competition with the plaintiffs does not *per se* constitute a Fifth Amendment taking. The Supreme Court has repeatedly held that when a governmental entity enters into otherwise lawful competition with a private utility, the resulting economic injury to the utility is *damnum absque injuria*. See, *e.g.*, *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1937). In the latter case the Court stated:

> What petitioner anticipates, we emphasize, is damage to something it does not possess - - namely, a right to be immune from lawful municipal competition. No other claim of right is involved. It is, in principle, as though an unauthorized loan were about to be made to enable the borrower to purchase a piece of property in respect of which he had a right, equally with a prospective complainant, to become the buyer. While the loan might frustrate complainant's hopes of a profitable investment, it would not violate any legal right; and he would have no standing to ask the aid of a court to stop the loan. What difference, in real substance, is there between the case supposed and the one in hand?

302 U.S. at 480. In such a case there is no compensable taking. See *United Railroads of San Francisco* v. *City and County of San Francisco*, 249 U.S. 517 (1919). The plaintiffs' freedom to exercise their own franchise has been in no way impaired, even though the profitability of their operation may decline. They have no constitutional right to compensation unless they have a legally protected, compensable interest in operating their franchise free of new competition.

If there is a federal statutory right to protection from government competition, *cf. Hardin* v. *Kentucky Utilities Co.*, *supra*, it derives from the Congressional intent expressed in 49 U.S.C. §§ 1602(e) and 1603 to provide for and encourage "to the maximum extent feasible" the participation of private enterprise and to compensate private mass transportation companies " for acquisition of their franchises or property to the extent required by applicable State or local laws." The evidence presented by the parties shows that the statutory policy of providing for private participation has

been fully recognized and taken into account.[10] The Transit District not only held public hearings on the project, of which the plaintiffs were aware, but also made every effort to invite and encourage the plaintiffs to bid on participation in the project and negotiated with them at length on possible roles for them to play under the demonstration grant. Ultimately the plaintiffs declined to bid on the project. The fact that the negotiations were unsuccessful does not mean that there has been a statutory violation. All the statute requires is encouragement of private participation "to the maximum extent feasible." It does not allow private transit operators to write their own ticket. Further, since no franchise or property interest has been acquired to trigger a duty to compensate, § 1602(e)(3) has not been violated.

It may be, however, that plaintiffs have a claim to compensation for a taking grounded in state law. They contend that their franchise from the PUCA assures them immunity from further competition unless there has been a determination by the PUCA that additional service is required by public convenience and necessity. See Conn. Gen. Stat. § 16-320. Thus, they contend, the Transit District's proposed competitive service is not "lawful" competition within the meaning of *Alabama Power.*

Whatever merit there may be to this claim, it is not a basis for any injunctive relief against the defendants in this suit. If any compensable taking will occur, the remedy is compensation, not an injunction to bar the competitive service. See *Joslin Mfg. Co.* v. *City of Providence,* 262 U.S. 668 (1923). There is no indication that reverse condemnation remedies are unavailable to the plaintiffs. Moreover, determination of whether

plaintiffs' have a right to be free of competition of the sort the Transit District proposes, in the absence of a PUCA finding of need, raises a question of state law inappropriate for decision by this Court. *Cf. Alabama Public Service Comm'n* v. *Southern Ry.,* 341 U.S. 341 (1951). It is for the PUCA and the state courts to determine whether as a matter of state law plaintiffs' present franchise accords them the degree of immunity they assert and whether, even if it does, that immunity protects against a competitive service operated pursuant to a federally funded demonstration grant.

It is true that the taking of a public franchise is a taking of property, for which compensation must be made. *United States* v. *Brooklyn Union Gas Co.,* 168 F.2d 391 (2d Cir. 1948). Here the franchise has not been acquired by the Transit District under the procedure established by Conn. Gen. Stat. § 7-273e. The plaintiffs are free to continue their operations exactly as before. At most the value of the franchise will be impaired. Under the circumstances, the Connecticut courts should have the opportunity to adjudicate this claim in a state court action seeking just compensation for the diminution in value of the franchise. In any event, there is no basis for a federal court to enjoin the commencement of the competing service, since compensation rather than an injunction is the only remedy for a taking by eminent domain.

IV. Conclusion

For the foregoing reasons the plaintiffs' motions for injunctive relief are denied. The other relief prayed for in the complaint, including a declaratory judgment of the invalidity of the approval of the grant applica-

tion as well as costs and attorneys' fees, is likewise denied. Judgment may enter in favor of all defendants.

Dated at New Haven, Connecticut, this 13 day of April, 1977.

Jon O. Newman

Jon O. Newman

United States District Judge

FOOTNOTES

[1] Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The agency in this case is the Department of Transportation, and the challenged action is its decision to provide financial assistance to the Transit District for its demonstration project.

[2] For criticism of the "zone of interest" test as enunciated by the Supreme Court in *Data Processing* and as subsequently applied by the courts, see K. Davis, Administrative Law of the Seventies 509-516 (1976).

[3] The statute in *Hardin* put certain limitations on the expansion of the Tennessee Valley Authority to protect private utilities from TVA competition.

[4] *South Suburban Safeway Lines, Inc.* v. *City of Chicago,* 416 F. 2d 535 (7th Cir. 1969), which suggested that § 1602 might not imply judicial review for a private transit operator, was decided prior to *Data Processing* and applied a more restrictive test for determining whether a competitor has standing.

[5] Defendants have submitted evidence to support their contention that traditional taxi companies, and particularly companies offering an exclusive ride service, have not been the beneficiaries of UMTA funds. Plaintiffs have made an offer of proof that at least some private taxi companies have been awarded UMTA funding for the provision of special services.

[6] The Transit District specifically invited and encouraged the plaintiffs to participate in bidding on the federally funded project to provide services including a shared-ride service.

[7] The legislative history indicates that Congress intended § 1602(d) to apply only to §1602 projects. P.L. 91-453, § 11, 84 Stat. 962, 91st Cong. 2d Sess.; H.R. Rep. No. 91-1264, 91st Cong. 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News 4092, 4101. *See also Township of Ridley* v. *Blanchette,* Civil Action No. 74-2113 (E.D. Pa. Oct. 12, 1976), distinguishing between §1602 projects and §1605 demonstration projects for purposes of §1602(d).

[8] Similarly, 49 U.S.C. §1604(i), invoked by the plaintiffs in their complaint but not briefed in their papers in support of this motion, applies by its terms only to projects funded "under this section" (§1604(i)). A §1605 project is not covered by §1604(i).

[9] Unlike §1610, which applies only to assistance "provided pursuant to *section* 1602," §1602(e) applies to financial assistance "provided under this *chapter.*" (emphasis added). For the reasons stated below, however, the legislative intent and administrative construction afford far more flexibility to §1605 demonstration projects than to the more substantial projects financed under other sections of the Act, For example, the requirement of §1602(e)(1) that the Secretary find that assistance "under this chapter" be *"essential* to a program, proposed or under active preparation, for a *unified or officially coordinated* urban transportation system as part of the *comprehensively planned development* of the urban area" (emphasis added) could not be applied to a demonstration project consistently with the language of §1605 itself, which authorizes the Secretary to make demonstration grants for the "development, testing, and demonstration of new facilities, equipment, techniques, and methods" in order to "*assist* in the reduction of urban transportation needs." It would be inconsistent with the goals of the Act to tie the Secretary's hands by restricting his authority to make demonstration grants only to projects found "essential" to a unified or comprehensive transportation, for such a narrow limitation would thwart innovation and experimentation under the demonstration grant provision.

[10] In light of the holding, *supra,* that the §1602(e) findings are not required for §1695 demonstration projects, a showing of substantial compliance with the statutory policy is sufficient. In any event, defendants claim that the requisite findings on private participation were made by UMTA in its memorandum recommending approval of the grant, introduced as Exhibit 2.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—September Term, 1977.

(Argued October 5, 1977 Decided January 24, 1978.)

Docket No. 77-6074

WESTPORT TAXI SERVICE, INC., MICHAEL AND ANTHONY GILBERTIE,

Plaintiffs-Appellants,

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, WESTPORT TRANSIT DISTRICT, PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY,

Defendants-Appellees.

Before:

FRIENDLY, GURFEIN and MESKILL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Jon O. Newman, *Judge,* in favor of the defendants in an action to enjoin implementation of a "demonstration project" financed under the Urban Mass Transportation Act of 1964. The Court of Appeals enjoined further federal funding of the project pending compliance with certain procedural requirements of the Act.

Affirmed in part, reversed in part and remanded with instructions.

RICHARD A. SILVER, Stamford, Connecticut (David S. Golub, Stamford, Connecticut, of counsel), *for Plaintiffs-Appellants.*

J. DANIEL SAGARIN, Bridgeport, Connecticut (Michael Shapiro, Schless, Sagarin, Neigher & Simon, Bridgeport, Connecticut, Richard Berkowitz, Berkowitz & Balbirer, Westport, Connecticut, of counsel), *for Defendants-Appellees Green, Meyers, Bradley and Westport Transit District.*

GLENN F. WASSERMAN, Attorney Advisor, Urban Mass Transportation Administration, Washington, D. C. (Robert W. Batchelder, Assistant Chief Counsel, Urban Mass Transportation Administration, Washington, D. C., Richard Blumenthal, United States Attorney, District of Connecticut, Diana Garfield, Assistant United States Attorney, District of Connecticut, of counsel), *for Defendant-Appellee Secretary of Transportation.*

MESKILL, *Circuit Judge:*

The purpose of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1601 *et seq.* ("the Act"), is to improve urban mass transportation systems. 49 U.S.C. § 1601(b).[1] It seeks to advance this purpose by providing,

1 49 U.S.C. § 1601 provides as follows:

Declaration of findings and purposes

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

among other things, financial assistance to mass transportation projects of various kinds, including so-called "demonstration projects." 49 U.S.C. § 1605(a).[2] The instant case is one in which a federally funded demonstration project to be conducted by a public mass transportation

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

2 49 U.S.C. § 1605(a) provides as follows:

The Secretary is authorized to undertake research, development, and demonstration projects in all phases of urban mass transportation (including the development, testing and demonstration of new facilities, equipment, techniques, and methods) which he determines will assist in the reduction of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation needs at minimum cost. He may undertake such projects independently or by grant or contract (including working agreements with other Federal departments and agencies). In carrying out the provisions of this section, the Secretary is authorized to request and receive such information or data as he deems appropriate from public or private sources.

company has encountered the opposition of an existing private transportation company which, for competitive reasons, has sought to enjoin the implementation of the project.

Defendant-appellee Westport Transit District ("Transit District") is a government entity formed by Westport, Connecticut in 1969 to organize, coordinate and provide mass transportation services in Westport. Conn. Gen. Stat. § 7-273b. Its appointed directors are defendants-appellees Paul R. Green, John E. Meyers and Richard Bradley. In April, 1975, the Transit District applied to the federal Urban Mass Transportation Administration ("UMTA") for a $25,000 grant to study the possibility of developing an integrated and coordinated transportation system for the community. The study had two immediate goals: first, to develop a plan for a complete transportation system that would utilize and coordinate existing and potential transportation services; second, to design a demonstration project to implement and experiment with various aspects of the plan. Such studies are eligible for funding under 49 U.S.C. § 1605(c). On June 26, 1975, the Administrator of the UMTA, to whom the powers of the Secretary of Transportation under the Act have been delegated, 49 C.F.R. § 1.51, approved the study grant. The study was conducted, and a demonstration project was proposed. Early in 1976, the Transit District applied for a grant of roughly $610,000 to implement the project. In July of 1976, the Administrator approved a grant for a two-year project. The basic question on this appeal is whether certain of the Act's procedural requirements had to be complied with prior to the Administrator's approval of the two-year implementation grant.

Plaintiff-appellant Westport Taxi Service, Inc. ("Westport Taxi") is a small taxi company owned by two broth-

ers, plaintiffs-appellants Michael and Anthony Gilbertie. It operates under a certificate of public convenience and necessity from the Connecticut Public Utilities Control Authority ("PUCA"). Conn. Gen. Stat. § 16-320. The type of service offered by Westport Taxi is known as "exclusive-ride" taxi service and is governed by PUCA regulation § 16-319-15, which requires that the consent of the first person to hire a taxicab be obtained before the taxi may take on additional riders. Westport Taxi's "fleet" consists of five aging taxicabs; its financial condition is precarious.

The Transit District's demonstration project will provide several new types of services. Principal among them will be a "shared-ride" taxi service provided with eleven new twelve-passenger vans that will compete directly with Westport Taxi. Plaintiffs fear that their taxi company will be destroyed if the project goes forward. Given their present financial condition, these fears appear to be well-founded.

Plaintiffs brought this action to enjoin the Secretary of Transportation from funding the project and the Transit District from implementing it. They argue that the Transit District failed to comply with two subsections of the Act. The first is 49 U.S.C. § 1602(d), which provides:

> Any application for a grant or loan under this chapter to finance the acquisition, construction, reconstruction, or improvement of facilities or equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant—
>
> (1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing;

> (2) has considered the economic and social effects of the project and its impact on the environment; and
>
> (3) has found that the project is consistent with official plans for the comprehensive development of the urban area.
>
> Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

The Transit District concedes that the certification required by this subsection was not included in its application. The second is 49 U.S.C. § 1602(e), which provides:

> No financial assistance shall be provided under this chapter to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned devel-

opment of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 1609(c) of this title.

All of plaintiffs' claims were rejected by the district court.[3]

STANDING.

The district court held that the plaintiffs have standing to maintain this suit. We agree. Plaintiffs are "likely to be financially injured," *F.C.C.* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940), *quoted in Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970), by the approval of the grants and thus satisfy the case or controversy requirement of Article III of the Constitution. Plaintiffs also satisfy the non-constitutional "zone of interests" test for standing. *See Association of Data Processing Service Organizations, Inc.* v. *Camp, supra*, 397 U.S. at 153. They fall within the "zone of interests" protected by § 1602(d) because they are members of the Westport "community"; they are "arguably

3 The plaintiffs argued in the district court, as they have in this Court, that the destruction of their business that will result if the project is implemented will amount to a "taking" without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. It is well established that there is no right to be free from governmental competition. *See Tennessee Elec. Power Co.* v. *T.V.A.*, 306 U.S. 118, 138-39 (1939). Plaintiffs' argument based on an alleged statutory right under 49 U.S.C. § 1602 to be free from competition in the absence of compliance with the requirements of that section is evaluated in our discussion of subsections (d) and (e) of that section.

within the zone of interests" protected by § 1602(e) because they are, at least arguably, a "mass transportation company."

SUBSECTION (d).

The certification requirement of § 1602(d) applies to "[a]ny application for a grant . . . under this Act to finance the acquisition, construction, reconstruction, or improvement of facilities or equipment which will substantially affect a community or its mass transportation service . . . ." Urban Mass Transportation Assistance Act of 1970, Pub. L. No. 91-453, § 2(d), 84 Stat. 962, 964 (1970). The defendants contend and the district court held that § 1602(d) need not be complied with here because the Transit District's project is a demonstration project under § 1605, a type of project to which § 1602 assertedly does not apply. According to their analysis, the Act establishes discrete, mutually exclusive categories of projects, each of which is governed by a different section of the Act. Under this view, a demonstration project under § 1605 need not comply with any other section of the Act.

We read the Act differently. By its own terms, § 1602(d) applies to "[a]ny application . . . under this Act" for a grant which, if implemented, meets certain objective criteria. This language suggests that the categories overlap —a demonstration project is exempt from sections other than § 1605 only if its nature is such that it does not meet the criteria those sections establish. Thus, a demonstration project may or may not involve "the acquisition . . . of facilities . . . which will substantially affect a community or its mass transportation service." If it does not, then § 1602(d) need not be complied with; if it does, however, the requirements of that subsection cannot be avoided merely because the project is a demonstration. We are

confident that Congress meant what it said when it wrote "[a]ny application . . . under this Act" and set forth objective criteria. It intended each project to be treated according to its impact, not just its type.

Under our reading of the statute, therefore, the impact of each proposed mass transportation project upon its community must be evaluated. The trial judge found that the Transit District's project "is a demonstration project only and does not involve the more significant commitment of resources and more substantial effect on the community necessary to bring the hearing and certification requirements of § 1602(d) into play" (footnote omitted). Because this finding is based on the erroneous view that § 1602 and § 1605 are mutually exclusive, it cannot stand. It is clear that this demonstration project involves "the acquisition, construction, reconstruction, or improvement of facilities or equipment" and "will substantially affect" Westport and its mass transportation service. Indeed, it is difficult to imagine how the implementation of a $600,000 project involving the purchase of eleven twelve-passenger vans, at a cost of over $150,000, in a town of less than 30,000 inhabitants could fail to have a substantial effect on the community and its mass transportation service. In fact, that appears to have been the very intent of those who designed the project. Appellees try to minimize the impact of the project by pointing out that it is merely a two-year demonstration. We find this approach unpersuasive. The demonstration may well be the start of a long-term program. The Transit District's new vans are not going to evaporate after two years; after they are demonstrated, they will likely become a permanent part of Westport's mass transportation service. Furthermore, two years can be a very long time for some citizens of Westport. Given the present state of plaintiffs' financial condition, it appears unlikely that it could survive this two-year program. It cannot be denied that the elimination of one of the two independent, traditional, exclusive-ride taxi services in Westport, together with the substitution of a new $600,000 project, would constitute a "substantial" effect on the community or mass transportation of Westport. Accordingly, § 1602(d) must be complied with. We note, however, that on the facts of this case compliance should be a relatively simple matter. The hearings required by § 1602(d)(1) have already been held, and the economic, social and environmental[4] impact of the project has been studied, as required by § 1602(d)(2), in great depth; the project is clearly "consistent with official plans for the comprehensive development of the urban area," § 1602(d)(3), for it is an integral part of Westport's own comprehensive mass transportation plan. Thus, § 1602(d) can be satisfied merely by amending the grant application so as to include the requisite certification under § 1602(d).

SUBSECTION (e).

The analysis applicable to § 1602(d) is also applicable to § 1602(e). Like subsection (d), subsection (e) applies to all "financial assistance . . . provided under this Act." Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, § 3(c), 78 Stat. 302, 303 (1964). However, only a "mass transportation company" may claim the protection of subsection (e). We have already held that, for standing purposes, Westport Taxi is "arguably within the zone of interests" protected by this subsection because it arguably fits the definition of a "mass transportation com-

4 The necessity of compliance with § 1602(d) triggers the requirements of § 1610(c). That section was complied with at the time the Transit District's grant was approved when a finding was made that "the proposed grant will not have significant impact on the quality of the environment."

pany." We must now decide, on the merits, whether it is in fact a "mass transportation company."

As originally enacted, the definition of "mass transportation" found in 49 U.S.C. § 1608(c)(5) covered "transportation by bus or rail or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing service) and moving over prescribed routes." Pub. L. No. 88-365, § 9(d)(5), 78 Stat. 302, 307 (1964). This definition clearly excluded traditional private taxi service, for taxicabs do not "move over prescribed routes." This definition proved too limited, however, because it excluded innovative, new "paratransit" systems, such as "dial-a-ride" or "minibus" services, which have more flexible routes. In the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 702, 82 Stat. 476, 535 (1968), the definition of "mass transportation" was changed. It now covers "transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) *on a regular and continuing basis*" (emphasis added). On its face, the definition is now broad enough to cover transportation service provided by means of a tandem bicycle, as long as it is provided "on a regular and continuing basis." In construing the definition, however, we must remember "that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, *J.*), *aff'd*, 326 U.S. 404 (1945). The purpose of the change in the definition of "mass transportation" was "to allow greater flexibility in developing and applying new concepts and systems in urban mass transportation programs." S. Rep. No. 90-1123, 90th Cong.,

2d Sess. 76-77; *see* H.R. Rep. No. 1585, 90th Cong., 2d Sess. 65-66, *reprinted in* [1968] U.S. Code Cong. & Ad. News 2873, 2940-41. Congress does not appear to have intended to include conventional taxi service within the changed definition, for such service cannot by any stretch of the imagination be considered a "new" concept or system.

In construing the definition of "mass transportation" we also look to the interpretation given it by the UMTA. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Charles F. Bingman, Acting Urban Mass Transportation Administrator, submitted to the district court an affidavit and supporting documentation in which the UMTA's interpretation of the Act is described as follows:

> UMTA has consistently included within [the] definition [of "mass transportation"] any form of collective transportation service which is regularly available to the public; i.e., *any service which cannot be reserved for the private and exclusive use of particular individuals or private groups*. . . . Hence, fixed-route bus or rail services and paratransit services such as dial-a-ride, jitney, shared-ride taxi, neighborhood transit, subscription bus service and other types of shared-ride transportation services which are available to the public or to special categories of users (such as elderly and handicapped persons) on a regular basis are considered by UMTA to be "mass transportation services." *Services which can be reserved for the exclusive use of individuals or private groups, either by the operator or the first patron's refusal to permit others to be picked up, such as exclusive-ride taxi service,* charter services, sightseeing services, employer vanpool programs, car rental services, for-hire limousines and private ambulance services are *not* deemed to be

"mass transportation" services for purposes of the UMT Act. (emphasis added).

See also 41 Fed. Reg. 46412-13. In view of this administrative interpretation and practice,[5] and in view of the legislative history of the 1968 amendment, we hold that a company such as Westport Taxi, operating five taxicabs under a regulation which provides that the consent of the first rider to hire a taxi must be obtained before others may be carried, is not a "mass transportation company" entitled to the protections afforded by § 1602(e).

CONCLUSION.

In view of our decision that there has been a failure to comply with § 1602(d), the judgment of the district court is reversed in part and the case is remanded with instructions to enter an order enjoining any further expenditure of federal funds on the demonstration project and granting such other relief as may be necessary pending the amendment of the Transit District's application so as to contain the requisite certification and pending the approval of the amended application by the UMTA Administrator. The decision below is in all other respects affirmed. The mandate shall issue forthwith. No costs.

Affirmed in part, reversed in part and remanded with instructions.

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5 The record contains evidence of two examples of UMTA funding of private taxicab companies. Both, however, involve specialized service designed to assist the elderly and handicapped, on whose behalf Congress has directed "that special efforts shall be made." 49 U.S.C. § 1612. Thus, we do not view such funding as being a significant exception to the UMTA's policy or as detracting from the pursuasive force of the UMTA's interpretation. *Compare Gilbert* v. *General Electric Co.*, 429 U.S. 125 (1976); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858 n.25 (1975).

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of February, one thousand nine hundred and seventy-eight

Present: HON. HENRY J. FRIENDLY
HON. MURRAY I. GURFEIN
HON. THOMAS J. MESKILL
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
FEBRUARY 28, 1978
A. DANIEL FUSARO CLERK
SECOND CIRCUIT

WESTPORT TAXI SERVICE, INC., MICHAEL GILBERTIE and ANTHONY GILBERTIE,
Plaintiffs-Appellants,
v.
BROCK ADAMS, Secretary of Transportation, WESTPORT TRANSIT DISTRICT, PAUL GREEN, JOHN E. MEYERS, Directors of Westport Transit District, and RICHARD BRADLEY, Executive Director, Westport Transit District,
Defendants-Appellees

77-6074

A petition for a rehearing having been filed herein by counsel for the appellants

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX D

UNITED STATES GOVERNMENT
Memorandum
DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION

Westport, Connecticut-Integrated Date: June 29, 1976
Taxi-Fixed Route Bus Service
Demonstration CT-06-0007-1
In reply refer to: Program Code: 34.07.0

Associate Administrator for Transportation
Management and Demonstration UMD-1
The Administrator UOA-1

1. Grantee

Westport Transit District
311 East State Street
Westport, Connecticut 06880

2. Objective

This project will directly impact on UMTA's goals of reducing the trip time, increasing transit coverage, and improving productivity. The project will demonstrate the integration of a range of integrated conventional and paratransit services including fixed route bus, shared-ride taxi, route deviation bus, and special market demand responsive service provided by both public and private operators. The project will demonstrate the applicability of such an integrated approach to medium and low density communities. In addition, the Transit District will deveop its role as a community transportation broker.

3. Project Description

The design for this demonstration project is the culmination of an UMTA grant to the Westport Transit District to study the integration of the existing fixed route bus system and privately

operated taxi system. Westport, with a population of approximately 28,000, has operated a fixed route bus system since mid-1974.

The transit district provides service on six fixed routes as well as service on special commuter routes serving a limited number of commuter trains.

Although expansion of service is a significant development, the most important feature of the proposed demonstration is the integration of conventional transit services provided by the District, and the new paratransit services to be provided by a private operator. It will bring a range of services under a single management system. The District will contract with either one or both of the current taxi operators to operate the paratransit services using vehicles owned by the District. The company will provide personnel, supervisory, and management functions. All revenues generated by the service would belong to the Transit District.

A crucial element to accomplish this integration will be the implementation of a single control center to dispatch and monitor the operation of all transportation services.

The major features of the demonstration project are:

1) *Shared-Ride taxi Service*- An integrated taxi service will be offered including both shared and premium ride as well as small package delivery. The service would be provided through a single dispatch center and would use approximately six twelve-passenger vans. The shared-ride taxi service will provide complementary service to the fixed route buses at times of low demand. Fares for the shared ride service will be integrated

with the current pre-paid annual pass system used by the district.

2) *Supplementary Fixed Route Service*- Greatly increased commuter service would enable the district to serve twice as many commuter trains. In addition, the district would be able to provide additional hours of fixed route service during the evening hours using smaller vehicles.

3) *Special Market Services*- Advance-request demand responsive service will be available for special user groups such as the elderly and handicapped and for groups such as day care centers who wish to subscribe for special services.

4) *Transportation Brokerage*- The Transit District will develop and expand its role as a transportation broker for the community. Pooling will be promoted as part of the project's overall public information program. Technical assistance will be provided in forming pools. Assistance in implementing subscription van programs will be provided to main employment centers in the community including the CBD. In addition, the Transit District will develop a program for utilizing occasional providers of paratransit service. Rather than add additional equipment to meet growing demand for some transit services, the District would pay individuals driving their own vehicles to provide supplementary service on certain routes during the peak periods.

4. Budget

In addition to the original $25,000 provided for this project, UMTA will provide $610,000. UMTA's share represents 80% of Capital costs for the purchase of vans and related equipment and of operating costs.

The State of Connecticut and Westport will contribute 20% of the Capital and operating costs in the amount of $153,841.

Total net project cost (gross cost less operating revenue) is $788, 841.

The Transit District plans to continue the service provided under the demonstration project through a combination of local support, State assistance, and UMTA's Section 5 funds.

5. Schedule

The project duration will be for a period of two years beginning July 1, 1976. Acutual implementation of service will begin in mid September, 1976 in Westport. Carpooling and vanpooling support activities would begin in early 1977.

6. Legal Determination

The Office of the Chief Counsel finds the proposed project is authorized under Section 6 of the Act, and that the applicant is legally acceptable as a grantee.

7. Labor Determination

The Assistant Secretary of Labor has specified the terms and conditions of the protective arrangements under Section 13 c of the Act.

8. Environmental Impact

In accordance with the National Environmental Policy Act of 1969 and the implementing directives, it is determined that the proposed grant will not have significant impact on the quality of the environment.

9. Recommendation

I recommend that you approve this project and have reserved $610,000 as the UMTA share. I also recommend that you find this project will assist in the improvement of Urban Mass Transportation service and the contribution of such service toward meeting total urban transportation needs at minimum cost.

Robert H. McManus

Attachments

I have made a fund reservation in the amount of $610,000 for this project.

_____

Graham Johnson

Date: 7/16/76

Approved:
Robert E. Patricelli

APPENDIX E

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION
ADMINISTRATION
WASHINGTON, D.C. 20590

THE ADMINISTRATOR

12 July, 1976

Mr. Bill R. Stokes
Executive Director
American Public Transit Association
1100 17th Street, N.W.
Washington, D.C. 20036

Dear Bill:

Thank you for your February 12, 1976 letter outlining a number of issues dealing with the paratransit area. I apologize for the delay in responding, but, as you know, we have been analyzing the entire paratransit area in anticipation of issuing a policy statement. We are still exploring a number of the more complex issues. However, I thought it would be helpful if I addressed some of the issues raised in your letter at this time.

Definition of Mass Transportation

In determining what constitutes "mass transportation", the Urban Mass Transportation Administration (UMTA) is guided by Section 12(c) (5) of the UMT Act of 1964, as amended. That section defines mass transportation as "transportation by bus, rail or other conveyance, either publicly- or privately-owned, which provides to the public general or special service on a regular and continuing basis". Within this definition UMTA includes any form of collective trans-

portation service available to the public, i.e., any service which cannot be reserved for the private and exclusive use of individual passengers. Services which qualify as "mass transportation" include dial-a-ride, jitney, shared-ride taxi, community minibus and certain forms of vanpooling. Services which are not eligible for mass transportation assistance are normal and historic taxi services, individual car rental services and for-hire limousine and private ambulance services.

Planning

All paratransit services assisted by UMTA funds must be part of any officially-developed transportation plan, and must be included in the annual element of the local Transportation Improvement Program. Such services must be needed for carrying out a program for a unified or officially-coordinated mass transportation system. We are encouraging urban areas developing Transportation System Management (TSM) plans to consider community-level paratransit services such as local circulation services, special services for elderly and handicapped persons, commuter-oriented feeder services to line haul transit and shared taxi services at night and on weekends. UMTA, as part of the review of the annual element of the Transportation Improvement Program, will ensure that paratransit-related services are adequately considered in the development of local plans.

Inclusion of Private Enterprise in the Planning and Operation of Paratransit Services.

Pursuant to the policy expressed in Section 4(a) of the UMT Act of 1964, as amended, UMTA encourages maximum feasible participation of existing private transportation carriers in the development and implementation of local paratransit programs and projects assisted with UMTA funds. Specifically, local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded a fair and timely opportunity to participate in the planning of community-level paratransit services and special services for elderly and handicapped persons developed pursuant to DOT Regulations for Transportation for Elderly and Handicapped Persons (49 CFR 613.204). Local private carriers must also be given an opportunity to recommend the inclusion of private paratransit services in the annual element of the Transportation Improvement Program.

It is against UMTA's policy to subsidize publicly-owned mass transportation systems and private non-profit organizations in wasteful competition with existing private operators when such operators are willing and able to provide paratransit services in an economic manner. Local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded full opportunity to bid for the provision of any general or special paratransit services proposed for implementation with the assistance of Federal funds. If a private operator can demonstrate that he is able to provide the required service in a cost effective manner, he should be given the right of first refusal on any such new services. An honest effort must be made to contract paratransit services out to private operators and to enable them to qualify as providers of such services.

Compliance with the above policy will be ensured by UMTA through a review of the annual element of the

Transportation Improvement Program, and of individual paratransit project applications for Section 3, 5 and 16(b) grants. Full review will be instituted upon complaint by a private operator that he has not been given a fair opportunity to participate in an UMTA-assisted paratransit program.

Protection of Existing Paratransit Operators

Pursuant to Section 3(e) of the UMT Act of 1964, as amended, UMTA will not provide financial assistance to any publicly-owned mass transportation company for the purpose of operating paratransit services in competition with or supplementary to the paratransit services already provided by an existing local taxi operator or other private transportation carrier, unless it finds that the officially-developed transportation program provides to the maximum extent feasible for the participation of such private carriers. Additionally, compensation as required by State and local law must be made to private paratransit operators for acquisition of their franchises or property associated with the provision of shared - (but not exclusive) ride services.

Labor

As you know, we are currently reviewing 13(c) issues with the Department of Labor in the interest of developing a consistent labor policy for the entire UMTA program. Labor protection issues, as they relate to paratransit services, are being discussed as part of the total reassessment.

I hope this initial information will be helpful.

Sincerely,

Robert E. Patricelli

APPENDIX F

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration
(UMTA Docket No. 76-05)

PARATRANSIT SERVICES

Proposed Policy

The purpose of this Notice is to issue for review and comment a statement of policy of the Urban Mass Transportation Administration with respect to paratransit.

The Urban Mass Transportation Act of 1964, as amended, declared it to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transport, both public and private. In support of this objective, the Urban Mass Transportation Administration declared flexible, collective paratransit services eligible for Federal capital and operating assistance under the formula grant (section 5) program (40 FR 2535, issued January 13, 1975)

The subsequent growth of interest in paratransit has made it desirable for UMTA to clarify its position on the potential role of this family of transportation services and on their implications for the administration of the Federal mass transportation assistance program.

The Urban Mass Transportation Administration invites comments on the proposed policy from all interested parties. Comments should be directed to UMTA's Office of Policy and Program Development, Room 9316, 400 Seventh Street, SW., Washington D.C. 20590. All written communications received on or before November 30, 1976, will be considered in the preparation of the final Statement of Policy.

Issued in Washington, D.C., on October 15, 1976.

ROBERT E. PATRICELLI,
Urban Mass Transportation Administrator.

POLICY ON PARATRANSIT

The strength of our transportation system lies in its diversity, with each mode contributing its unique and inherent advantages and responding to different consumer demands at various levels of cost and quality of service. It is the policy of the Department of Transportation to preserve and encourage this diversity by promoting competitive opportunity for all forms of transportation, both public and private; and to encourage cooperation, connectivity and integration among different modes and types of service.

Paratransit—flexible, collective transportation services, operated publicly or privately and using small or intermediate-sized vehicles—has an important role to play in such a unified transportation system. Its various forms, when properly designed and implemented as part of a coordinated area-wide transportation plan, can satisfy a wide range of local transportation needs that would otherwise remain unmet or provided for less effectively. In rural America, in small towns and in suburban communities where population densities are low and travel patterns diffuse, paratransit will often be the most economical form of local public transportation. In many communities, large and small, paratransit can offer the best means of serving the needs of elderly, young and handicapped persons, and those who do not own cars and have no convenient access to regular public transportation.

The effectiveness and efficiency of a total transportation system can be increased by coordinating paratransit with conventional transit. In lower and medium density areas where the automobile is the only access mode to regular transit service, paratransit can provide pre-arranged collection-distribution service to fixed-route line haul systems, thereby extending the reach of public transportation into low density residential areas that would otherwise remain unserved. If demand increases, paratransit services can be progressively replaced by conventional fixed-route services. Thus, paratransit can serve as a vanguard for regular transit, opening up new market territory and building up the transit habit at a cost affordable to the community.

Paratransit can also supplement conventional fixed-route service by providing higher quality service to those who desire and are willing to pay for it. The combined effects of a high level of automobile availability, increased affluence and more dispersed travel patterns have estranged many

people from conventional transit. Flexible, personalized paratransit services offer a chance of persuading the transit independents to abandon their total reliance on the private automobile and to become users of public transportation for local, short-distance trips.

Finally, paratransit, in the form of voluntary, cooperative ride-sharing arrangements, can enable people living in outlying portions of metropolitan areas with no convenient access to regular transit service to cease their dependency on the private automobile for the trip to work, and to contribute to the goal of relieving congestion and conserving energy.

In sum, transit and paratransit complement each other and can be made to work in a productive partnership to the advantage of both modes. In some cases this partnership can take the form of cooperative arrangements between private and public operators, each serving a different segment of the market. In other cases, a public transit authority can serve as a broker, contracting with different private and public operators to provide the most economical and convenient service to fit the market needs of a particular segment of the community. The important point is that our metropolitan areas, with their varied forms, densities and travel patterns, require a mix of conventional and flexible transit services to serve different market needs. An effective metropolitan transportation system should take the form of a cooperative partnership of paratransit and regular transit modes, with closely coordinated services and with the possibility of varied ownership of its different components. Such a system offers promise of the greatest overall operating efficiency and effectiveness by exploiting the inherent advantages of each mode and providing a range of differentiated service options that respond to varying consumer demands and different local needs and budgets.

PLANNING FOR PARATRANSIT SERVICES

UMTA encourages urban areas to consider paratransit services whenever such services offer promise of a more effective, efficient and economical way of providing needed public transportation service. Examples of circumstances for which paratransit service could be appropriate are local circulation in low density areas, transportation of elderly and handicapped persons, substitute late night and weekend transit service in central cities, feeder/distribution

service to line haul operations in low density neighborhoods, and cooperative ride-sharing arrangements for the home-to-work trip.

Consideration of paratransit services is encouraged in the development of Transportation System Management (TSM) plans, Transit Development Programs in non-urbanized areas, and plan elements developed pursuant to UMTA regulations concerning Transportation for Elderly and Handicapped Persons (49 CFR 613). UMTA will seek to ensure, as part of the annual review of the Transportation Improvement Program (TIP), that the use of paratransit services has been adequately considered in the development of the TSM plan and the plan element intended to meet the transportation needs of elderly and handicapped persons (49 CFR 613), and that those paratransit services that have been included in the TSM plan are programmed for implementation. At the same time, the intent and spirit underlying the Federal program of mass transportation assistance is to leave to localities the widest possible discretion and flexibility in deciding upon the nature and mix of their transportation system. UMTA, therefore, will abide by the local judgment as to the choice of modes and mix of services to be included in the local plan and program.

Sections 3(e) and 4(a) of the Urban Mass Transportation Act of 1964, as amended (hereinafter "the Act") encourage maximum feasible participation of private enterprise in carrying out the local urban transportation program. Pursuant to this policy, UMTA will seek to ensure, as part of the annual review of the Transportation Improvement Program (TIP), that local taxi operators and other private transportation providers have been afforded a fair and timely opportunity to participate in the development of local transportation plans and programs and to recommend the inclusion of private paratransit services (including special services for elderly and handicapped persons) in the Transportation System Management (TSM) plan and in the annual element of the Transportation Improvement Program (TIP).

Outmoded local laws, regulations and ordinances often constitute a barrier to paratransit implementation. Local and State agencies are encouraged to review existing laws, regulations and ordinances pertaining to paratransit operation, and eliminate or revise obsolete requirements or prohibitions that constrain or inhibit the introduction of paratransit services.

The proliferation of different social service agencies providing independent and uncoordinated special transportation services often constitutes an unnecessary duplication in equipment, facilities or labor, and represents a potential waste of public funds. State and local governments are urged to ensure maximum possible coordination in the delivery of such special transportation services, including offering existing operators a first opportunity to deliver the needed service with the funds available. UMTA, for its part, will attempt to facilitate such coordination through close cooperation with other Federal agencies.

PROTECTION OF EXISTING PRIVATE OPERATORS

Provision of paratransit service will often be carried out most efficiently and effectively by private transportation companies. It is in the public interest not to foreclose private operators from engaging in the provision of paratransit service where such private operators are willing and able to provide this service. Pursuant to this policy and to Sections 3(e) and 4(a) of the Act, UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by an existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies (whether or not such companies are providing at the time mass transportation services).

A local transportation program will be found to provide for maximum feasible participation of private transportation companies if it offers local taxi operators and other private transportation providers full opportunity to bid for the provision of any new paratransit services that might be proposed by public bodies for the implementation with the assistance of UMTA funds; and if it provides for the selection of the service provider competitively, on the basis of the highest efficiency and effectiveness, and least cost.

Compliance with the above policy of protection of private enterprise in the delivery of paratransit services will be ensured by UMTA through the annual review of the

Transportation Improvement Program (TIP). Regulations are also being developed which will implement the general statutory requirement that maximum feasible participation be accorded to private enterprise in implementing an urban transportation program, going beyond the area of paratransit service.

ELIGIBILITY FOR FEDERAL FINANCIAL ASSISTANCE

Federal funds available pursuant to Sections 3 and 5 of the Act may be used to assist in the provision of paratransit services by publicly or privately owned transportation companies. Such funds may be used for the acquisition of equipment and for the payment of operating expenses (including depreciation on capital equipment) involved in the delivery of paratransit services. Any financial assistance to privately owned companies must, under the Act, be provided through a contractual arrangement with a public body or agency thereof or with a private non-profit organization.

To be eligible for such Federal financial assistance, a paratransit service must be included in the annual element of the local Transportation Improvement Program (TIP), or in a Transit Development Program (TDP) in the case of non-urbanized areas.

Paratransit services which may qualify for Federal financial assistance include dial-a-ride, jitney, community minibus, subscription bus service, certain forms of van-pooling and other types of collective (shared-ride) transportation services which are regularly available to the public, i.e. which cannot be reserved for the private and exclusive use of individual passengers.

Services which are not eligible for Federal financial assistance include exclusive-ride taxi services, car rental services, for-hire limousines and private ambulance service, and other similar forms of private transportation.

Where an organization is providing paratransit service as an incidental adjunct to its main business, UMTA will not consider such organization to be a mass transportation company within the meaning of Section 3(e) of the Act, or a mass transportation company or system with employees entitled to protection under Section 13(c). For example, a non-profit senior citizens center receiving capital assistance directly or through a public body under Section 3 or Section 16

of the Act for the purpose of providing transportation services to and from the center, would be considered by UMTA as not within the meaning of Sections 3(e) and 13(c). Similarly, a private taxi operator providing shared-ride paratransit services or contract services to a public transit authority, e.g. to provide special transportation services for elderly and handicapped persons, could be held to be providing such services on an incidental basis to its main business.

RESEARCH, DEVELOPMENT AND EXPERIMENTATION

To assist in making paratransit a more viable option for urban areas, UMTA maintains an active paratransit research, development and demonstration program. The objectives of this program are: (1) to investigate the potential of combining flexibly routed and fixed-route services in regional coverage systems integrating paratransit and conventional transit modes; (2) to develop and demonstrate viable institutional arrangements to support paratransit; (3) to develop and test improved vehicles and support technology for the delivery of paratransit services; and (4) to demonstrate innovative applications of paratransit services.

[FR Doc.76-30740 Filed 10- ;8:45am]

APPENDIX G

UMTA's View of the Role of Taxicabs In Public Transportation

By C. Kenneth Orski

The strength of our transportation system lies in its diversity, with each mode contributing its unique and inherent advantages and responding to different consumer demands at various levels of cost and quality of service. It is the policy of the Department of Transportation to preserve and encourage this diversity by promoting competitive opportunity for all forms of transportation, both public and private; and to encourage cooperation, connectivity and integration among different modes and types of service.

Paratransit--flexible, collective transportation services, operated publicly or privately and using small or intermediate-size vehicles-- has an important role to play in such a unified transportation system. Its various forms, when properly designed and implemented as part of a coordinated areawide transportation plan, can satisfy a wide range of local transportation needs that would otherwise remain unmet or provided for less effectively. In rural America, in small towns and suburban communities where population densities are low and travel patterns diffuse, paratransit will often be the most economical form of local public transportation. In many communities, large and small, paratransit can offer the best means of serving the needs of elderly, young and handicapped persons, and those who do not own cars and have no convenient access to regular public transportation.

The effectiveness and efficiency of a total transportation system can be increased by coordinating

paratransit with conventional transit. In lower and medium density areas where the automobile is the only access mode to regular transit service, paratransit can provide prearranged collection-distribution service to fixed-route line haul systems, thereby extending the reach of public transportation into low density residential areas that would otherwise remain unserved. If demand increases, paratransit service can be progressively replaced by conventional fixed-route services. Thus, paratransit can serve as a vanguard for regular transit, opening up new market territory and building up the transit habit at a cost affordable to the community.

Paratransit can also supplement conventional fixed-route service by providing higher quality service to those who desire and are willing to pay for it. The combined effects of a high level of automobile availability, increased affluence and more dispersed travel patterns have estranged many people from conventional transit. Flexible, personalized paratransit services offer a chance of persuading the transit independents to abandon their total reliance on the private automobile and to become users of public transportation for local, short-distance trips.

Finally, paratransit, in the form of voluntary, cooperative ride-sharing arrangements, can enable people living in outlying portions of metropolitan areas with no convenient access to regular transit service to cease their dependency on the private automobile for the trip to work, and to contribute to the goal of relieving congestion and conserving energy.

In sum, transit and paratransit complement each other and can be made to work in a productive partnership to the advantage of both modes. In some cases

this partnership can take the form of cooperative arrangements between private and public operators, each serving a different segment of the market. In other cases, a public transit authority can serve as a broker, contracting with different private and public operators to provide the most economical and convenient service to fit the market needs of a particular segment of the community. The important point is that our metropolitan areas, with their varied forms, densities and travel patterns, require a mix of conventional and flexible transit services to serve different market needs. An effective metropolitan transportation system should take the form of a cooperative partnership of paratransit and regular transit modes, with closely coordinated services and with the possibility of varied ownership of its different components. Such a system offers promise of the greatest overall operating efficiency and effectiveness by exploiting the inherent advantages of each mode and providing a range of differentiated service options that respond to varying consumer demands and different local needs and budgets.

Planning for Paratransit Services

UMTA encourages urban areas to consider paratransit services whenever such services offer promise of a more effective, efficient and economical way of providing needed public transportation service. Examples of circumstances for which paratransit service could be appropriate are local circulation in low density areas, transportation of elderly and handicapped persons, substitute late night and weekend transit service in central cities, feeder/distribution service to line haul operations in low density neighborhoods, and

cooperative ride-sharing arrangements for the home-to-work trip.

Consideration of paratransit services is encouraged in the development of Transportation System Management (TSM) plans, Transit Development Programs in non-urbanized areas, and plan elements developed pursuant to UMTA regulations concerning Transportation for Elderly and Handicapped Persons (49 CFR 613). UMTA will seek to ensure, as a part of the annual review of the Transportation Improvement Program (TIP), that the use of paratransit services has been adequately considered in the development of the TSM plan and the plan element intended to meet the transportation needs of elderly and handicapped persons (49 CFR 613), and that those paratransit services that have been included in the TSM plan are programmed for implementation. At the same time, the intent and spirit underlying the federal program of mass transportation assistance is to leave to localities the widest possible discretion and flexibility in deciding upon the nature and mix of their transportation system. UMTA, therefore, will abide by the local judgment as to the choice of modes and mix of services to be included in the local plan and program.

Sections 3(e) and 4(a) of the Urban Mass Transportation Act of 1964, as amended (herein after "the Act") encourage maximum feasible participation of private enterprise in carrying out the local urban transportation program. Pursuant to this policy, UMTA will seek to ensure, as part of the annual review of the Transportation Improvement Program (TIP), that local taxi operators and other private transportation providers have been afforded a fair and timely opportunity to participate in the devel-

opment of local transporation plans and programs and to recommend the inclusion of private paratransit services (including special services for elderly and handicapped persons) in the Transportation System Management (TSM) plan and in the annual element of the Transportation Improvement Program (TIP).

Outmoded local laws, regulations and ordinances often constitute a barrier to paratransit implementation. Local and State agencies are encouraged to review existing laws, regulations and ordinances pertaining to paratransit operation, and eliminate or revise obsolete requirements or prohibitions that constrain or inhibit the introduction of paratransit services.

The proliferation of different social service agencies providing independent and uncoordinated special transportation services often constitutes an unnecessary duplication in equipment, facilities or labor, and represents a potential waste of public funds. State and local governments are urged to ensure maximum posible coordination in the delivery of such special transportation services, including offering existing operators a first opportunity to deliver the needed service with the funds available. UMTA, for its part, will attempt to facilitate such coordination through close cooperation with other federal agencies.

Protection of Existing Private Operators

Provision of paratransit service will often be carried out most efficiently and effectively by private transportation companies. It is in the public interest not to foreclose private operators from engaging in the pro-

vision of paratransit service where such private operators are willing and able to provide this service. Pursuant to this policy and to Sections 3(e) and 4(a) of the Act, UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies (whether or not such companies are providing at the same time mass transportation services).

A local transportation program will be found to provide for maximum feasible participation of private transportation companies if it offers local taxi operators and other private transportation providers full opportunity to bid for the provision of any new paratransit services that might be proposed by public bodies for implementation with the assistance of UMTA funds; and if it provides for the selection of the service provider competitively, on the basis of the highest efficiency and effecitiveness, and least cost.

Compliance with the above policy of protection of private enterprise in the delivery of paratransit services will be ensured by UMTA through the annual review of the Transportation Improvement Program (TIP). Regulations are also being developed which will implement the general statutory requirement that maximum feasible participation be accorded to private enterprise in implementing an urban transportation program, going beyond the area of paratransit service.

Eligibility for Federal Financial Assistance

Federal funds available pursuant to Sections 3 and 5 of the Act may be used to assist in the provision of paratransit services by publicly or privately owned transportation companies. Such funds may be used for the acquisition of equipment and for the payment of operating expenses (including depreciation on capital equipment) involved in the delivery of paratransit services. Any financial assistance to privately owned companies must, under the Act, be provided through a contractual arrangement with a public body or agency thereof or with a private non-profit organization.

To be eligible for such Federal financial assistance, a paratransit service must be included in the annual element of the local Transportation Improvement Program (TIP), or in a Transit Development Program (TDP) in the case of non-urbanized areas.

Paratransit services which may qualify for Federal financial assistance include dial-a-ride, jitney, community minibus, subscription bus service, certain forms of vanpooling and other types of collective (shared-ride) transportation services which are regularly available to the public, i.e. which cannot be reserved for the private and exclusive use of individual passengers.

Services which are **not** eligible for Federal financial assistance include exclusive-ride taxi services, car rental services, for-hire limousines, and private ambulance service, and other similar forms of private transportation.

Where an organization is providing paratransit service as an incidental adjunct to its main business,

UMTA will not consider such organization to be a mass transportation company within the meaning of Section 3(e) of the Act, or a mass transportation company or system with employees entitled to protection under Section 13(c). For example, a non-profit senior citizens center receiving capital assistance directly or through a public body under Section 3 or Section 16 of the Act for the purpose of providing transportation services to and from the center, would be considered by UMTA as not within the meaning of Sections 3(e) and 13(c). Similarly, a private taxi operator providing shared-ride paratransit services or contract services to a public transit authority, e.g. to provide special transportation services for elderly and handicapped persons, could be held to be providing such services on an incidental basis to its main business.

Research, Development and Experimentation

To assist in making paratransit a more viable option for urban areas, UMTA maintains an active paratransit research, development and demonstration program. The objectives of this program are: (1) to investigate the potential of combining flexibly routed and fixed-route services in regional coverage systems integrating paratransit and conventional transit modes; (2) to develop and demonstrate viable institutional arrangements to support paratransit; (3) to develop and test improved vehicles and support technology for the delivery of paratransit services and (4) to demonstrate innovative applications of paratransit services.

ABOUT THE AUTHOR

C. Kenneth Orski, Associate Administrator for Policy and Program Development
URBAN MASS TRANSPORTATION ADMINISTRATION

C. Kenneth Orski was appointed Associate Administrator for Policy and Program Development in May 1974. In this position, he coordinates the development, planning, and evaluation of the overall UMTA program; carries out long-range policy analysis; and serves as the principal adviser to the Administrator on the development of UMTA's goals, missions, policies and legislative proposals.

APPENDIX H

UMTA's Current Involvement With the Taxicab Industry

James A. Bantz is with the Urban Mass Transportation Office of Service, Methods and Demonstrations. Bantz is in charge of the Paratransit Demonstrations Divisions and he is the liaison with the taxicab industry. Subject of his presentation at the ITA annual convention was UMTA's current involvement with the taxicab industry.

It is published here for the benefit of those readers who were unable to attend the meeting.

I think that in the past year we have come a long way in our efforts to incorporate taxis into UMTA programs; and more importantly to have them recognized as effective mass transportation vehicles, the potential of which has not been fully realized.

I thank you very much for asking me to come back again this year and bring you up to date on some of the UMTA activities during the past year, which have affected the taxicab industry. I know when I talked to you last year I told you that any progress of the involvement of the taxicab industry with urban mass transportation systems was going to be slow. And I think by now a lot of you realize that it's going to be very slow. And to some of you the progress probably seems glacial. However, I think that in the past year we have come a long way in our efforts to incorporate taxis into UMTA programs; and more importantly to have them recognized as effective mass transportation vehicles, the potential of which has not been fully realized. Progress has been made in the area of hardware development, demonstration projects and

policy implementation; and today I'd like to briefly touch onto all three of these areas.

Now in the past year some of you may have been contacted by different types of people: university professors, consultants, government employees, maybe planners asking about the taxicab industry. I've talked to some operators who wonder why all these people are bothering them. They get a call one day from somebody and he asks to hear all about the taxicab industry; and the next day somebody else will call and say, I heard you had a great innovative project going and I want you to tell me about it. I do ask that you bear with us on that, because there's a tremendous educational process that has to take place in the governmental process of including the taxicab into urban transportation systems that can be funded with federal money. We have a system that involves local and state planning organizations, state DOT's; it involves universities, and universities are the ones that are going to train the planners of the future. And so, to the extent that they understand your problems, and your requirements, and what you can do, and the services you can provide, this would make it much easier to get taxicab operations considered to be part of the total urban transportation system.

I know it's annoying in some cases. I was talking to John Hall about this a little while ago and I know he gets besieged with people who keep coming in and saying, show me your shared-ride taxi system, it's such a great thing. And, really, this is part of the process of getting these concepts viewed in a different way, in a way that, can be considered to be part of the urban mass transportation system.

Museum Exhibit

During the past year, I guess the project that has received the most publicity was the one run by the Museum of Modern Art in New York City, which was an exhibit of prototype taxi designs. The project was funded with grants from UMTA and the Mobile Oil Corporation, and it demonstrated that with a little imagination, more comfortable vehicles can be designed for taxi use. More importantly, however, the exhibit received a tremendous amount of publicity; and it raised the consciousness of Americans as to the important role of taxis in urban transportation systems, and the increased role that could be played by existing taxi operators given the proper regulatory, legal and institutional environments. Having the Museum of Modern Art involved turned out to be extremely important. As it turned out, that particular project has probably done more to focus attention on the taxicab as a mass transit vehicle than anything else that we've done in the past year. It received millions of dollars worth of publicity; and it was done by an organization that probably had more credibility than either the International Taxicab Association or UMTA in trying to push these ideas, because it was viewed as a neutral observer of the urban scene and it had a tremendous impact.

Our Office of Research and Development is currently exploring ways to continue the momentum generated by that project, and to in- to continue the momentum generated by that project, and to incorporate the ideas expressed in the prototypes into some type of practical production vehicle. That's going to be in the future; these vehicles were just prototypes but we're trying to carry the thing forward.

Other Projects

Another project that is under devevelopment in our Office of Research and Development is the testing of diesel taxis. Again, this was talked about a year ago; today still no taxis on the street. However, 66 are on order, and they're being delivered now through December 24th. It is expected that testing will continue through 1978.

Another research and development project was a contract recently awarded to Dave Systems, Inc., to determine the type of computer system that would be useful for assisting taxi operators in management dispatching of exclusive rides, shared-ride and other taxi services integrated into the urban transportation system. This work is being developed by the Research and Development Office. Eventually, when it is developed we'll be using it in demonstration projects.

As far as demonstrations are concerned, I think we've made a lot of progress in the past year in actually getting some projects underway; a year ago we were just talking about them. In Danville, Illinois, the so-called user side subsidy demonstration has been under way for some time. Under this scheme, senior citizens can receive subsidized taxi trips with the subsidy going to the individual and not to a particular operator. In this way, the individual can select a taxi company that provides the best service. Operationally the demonstration has worked very well. The subsidy per passenger trip is in the range of one dollar, which is really quite a low cost to pay for high quality door to door service. One dollar per trip compares very favorably to what most dial-a-ride operators are paying around the country. Now we're trying to expand on this concept and discussions are currently underway to involve the taxi and bus operators in Danville to

provide transit service for all Danville residents. We feel that this approach will be cheaper and more efficient than starting a new independent transit operation.

We're also trying out the user-side subsidy concept in Montgomery, Alabama; and Lawrence, Massachusetts; and we're developing a project in Kinston, North Carolina. These projects will try different fare collection schemes and they'll be in cities with and without fixed-through transit service. The problem is that these cities are small. The next step is to try the approach in a larger city with more taxi operators. I think so far the results are promising. There haven't been any particular operational problems; and the costs are relatively low. It looks like this concept can be expanded to provide transit service to the general population using existing private operators. A taxi feeders to fixed-route bus project was finally funded in St. Bernard Parish, Louisiana. Again this is a small project, but the particular setting provides a good opportunity to look at the operational effectiveness in economics of taxi feeder service.

Taxi feeder is an extremely simple concept. The way that we are testing it is to use the taxis to provide an extension of fixed-route service into low density areas rather than running a more expensive fixed-route bus. The concept was tested successfully in Peterbourough, Canada, where a taxi feeder was substituted for a fixed-route bus in a low density suburban neighborhood. The service improved, the ridership improved, and most importantly, the cost per passenger trip dropped from $2.43 per passenger trip from that suburban neighborhood to 60 cents. So the effect was quite dramatic. I think that the major reason why it was effective is that the taxi operator in Peter-

bourough was only paid when a demand existed. In other words, it wasn't a question of running a fixed-route bus all day and all night whether or not there was any demand; but when there was a demand people would call the taxi company and they would be taken to the transfer point to go on a fixed-route bus. So it only cost the city when there was demand.

Right now we're looking for a medium sized city in which to test the feeder concept. We attempted to develop such a project in Forth Worth, and it failed when the City Council rejected the motion to submit a demonstration application to UMTA. We've run into a lot of problems trying to get any demonstration going in this particular case. There is resistance on the part of local public officials to providing public tax money as a subsidy to private operators. Another problem is that local officials are very reluctant to try anything which may add to the current transit operating deficit. They're very sensitive about this, and even though this concept could conceivably save money for transit systems there is a lot of reluctance to go ahead with something new.

Another taxi demonstration project should soon get under way in Nassau County, New York. This project will expand the range of services offered by taxi operators and attempt to bring down the cost per passenger trip by increasing productivity. In Westport, Connecticut, we're working to involve local taxi operators to provide shared-ride service and supplementary service to the fixed-route bus system. Another demonstration project, which has been under discussion for the last two years is in Orange County, California. We want to develop an integrated demand responsive fixed-route service using taxis to provide demand service within defined zones and feeding the

fixed-route bus. I'm hopeful that this project will also be used to further refine computer software that was developed for the dispatching of shared-ride vehicles. In Knoxville, Tennessee, the University of Tennessee has been acting as a transportation broker and working with taxi operators to provide taxi feeder service to fixed-route.

Studies Underway

In addition to demonstrations, we have studies underway in Arlington County, Virginia, to study the development of shared-ride taxi service; and Carnegie Mellon University in Pittsburgh is studying the development of a transportation brokerage service for that city. The broker will seek to match supply and demand and maximize the use of existing transportation providers including taxicabs. The important elements in Pittsburgh that they're working on are coordination of social service agencies and the use of the broker to channel money that is available for social service agencies to existing transportation providers rather than establishing new service and making the situation any worse than it is today. Another study is underway in University of North Carolina: Professor Gorman Gilbert, who spoke to the convention last year, is continuing his work to try to improve taxicab service and provide better business conditions for the small taxi operators in the state of North Carolina. Again that project will have several different kinds of outputs which will be good for the taxicab industry. Professor Gilbert is probably going to learn more than anybody else from this project; this will be reflected in his teaching of transportation students. The students that he's teaching are the ones who are going to be making the decisions regarding the allocation of money for transportation. So you can see how these

projects have some very far-reaching effects going into the future. Professor Gilbert has produced a couple of reports; one from his first phase work, a couple of draft reports looking at usage of taxicab by time of the month, and also some ideas for improving service and coordinating service better for small taxi operations.

Very briefly this has been an overview of some of the work we've been doing. We have several things going; we have other projects planned for fiscal year 1977 and fiscal year 1978. These are all small projects and we have a very long way to go. I think that from what I've said it's a good start. We haven't really come to grips with the major problems and we haven't come to grips with the problems in larger cities, which are mainly institutional problems. The concepts that work well in small cities may mean an entirely different set of problems when they're tried in larger cities. When we're working in small cities, we're usually working with one or two operators. When we get to larger cities with more operators we're going to run into different problems. However, the use of the techniques that we're developing in these demonstrations can only be considered a success if they're accepted by planners and government officials as part of the total urban transportation system. This means that the use of taxis must be included in alternative analyses conducted by planning organizations. Taxi operators must become involved in the transportation planning process. Also, public funds must be made available to support shared-ride taxi services which are part of a transit network.

UMTA has made a couple of important policy decisions in the past year which affect the role of taxis. Most of you are probably aware of the 16b2 regu-

lations which now enable private transportation providers an opportunity to provide these services for the elderly and handicapped, and give the private owners a chance to work with public agencies to determine what service the private operator can provide. I think that the agreement by the DAST Service in Delaware to work with local taxi operators is a good example of what can be done when the social service agency providers and the local taxi operators work together. All the problems are not worked out yet; however, I think that these regulations are a step in the right direction. The most significant development in the past year was the issuance last week of a draft paratransit policy statement by UMTA. Any interested party may comment on these regulations within 45 days after the publication date in the Federal Register. The policy statement gives official recognition to the UMTA stand on paratransit services, which has been expounded in speeches and letters over the past year. The statement emphasizes that paratransit service can be an effective part of an urban transportation system, and can serve certain markets more effectively than conventional fixed-route transit. We feel that paratransit can be used to greatest effect by coordinating it with conventional transit, and providing service that complements and supplements fixed-route transit.

The policy statement is explicit in requiring that paratransit services be considered in the development of local transportation plans. The statement encourages the elimination of outmoded laws, regulations and ordinances, which constitute barriers to paratransit implementation. The coordination of social service agency transportation is also encouraged. One section that's particularly relevant to the taxi indus-

try states that "local taxi operators and other private carriers must be afforded a fair and timely opportunity to participate in the planning of community level and special transit service for the elderly and handicapped, and in the development of the local transportation plan. UMTA will not provide financial assistance to support public paratransit services in competition with similar private services unless honest efforts are made to involve private operators as providers of paratransit services." Compliance with this policy will be insured by UMTA annual review of the transportation improvement program.

Finally, the policy statement addresses the question of Section 13C of the UMTA act, which protects the rights of transit labor. The statement declares that in cases where paratransit service is offered by a private operator incidental to the provision of his regular service then UMTA will not consider it as falling within the purvue of 13C. I'm sure you are going to have a lot of questions and a lot of comments about this policy statement. On Wednesday, Ken Orski, who is the UMTA Associate Administrator for Policy and Program Planning, will be speaking to the convention. His office is the one that drafted the policy statement and it is to this office that you would send your comments. Let me emphasize that this is a draft policy statement and it may be changed based upon the comments received, so I encourage you please make your comments known in writing to UMTA. I welcome you after the talk to come up and get copies of the policy statement; read it over; be ready for Ken when he comes here to have questions at that time, and please make your comments known in writing to him. I'm sure that several of the items in this statement are going to be controversial and you definitely should

make your views known. This very briefly is just an overview of what's happened in the past year and I'm very encouraged by it. I'm hopeful that the momentum that's been started for the development and coordination and effective use of transportation resources will become a reality in the future. Thank you very much.

APPENDIX I

S. Rep. No. 82-83, 88th Cong., 2d Sess, See H.R. Rep. No. 204, 90th Cong, 2d Sess — reprinted in [1964] U.S. Code Cong & Admin. News, pp. 2583-2584.

1964 U.S. Congressional Code
And Administrative News
2583 -2584

Protection of Transit Employees

The committee has given the most careful consideration to possible adverse effects of the bill on the interests of those engaged in transit employment. Labor organization representatives have expressed particular concern as to the possible effects of automation and the impact which public acquisition of existing private companies may have on the established status and bargaining rights of employees.

With respect to public ownership and operation, the committee believes that existing private companies will be acquired in only a few cases. It has been pointed out that existing private transportation companies are to participate in the assistance provided by this bill. It is not the intent of this legislation to promote ownership of urban transportation systems, or to eliminate or curtail collective bargaining rights. The bill would help existing private companies to remain in business and to improve the transportation services they offer. If these aims are accomplished, the committee believes that those presently employed in existing private mass transit service will have much better chances than at present for continued employment, thus protecting the rights and privileges which have been already established and preserving their status quo.

Although the problem of worker protection may arise in only a limited number of cases, the committee nevertheless believes that the overall impact of the bill should not be permitted to obscure the fact that in certain communities individual workers or groups of workers may be adversely affected as the result of the introduction of new equipment or the reorganization of existing transit operations. The principle of protecting workers affected as a result of adjustments in an industry carried out under the aegis of Federal law is not new, particularly in the transportation industry. Thus, railroad employees for years have enjoyed Federal protection against adverse effects attendant upon railroad consolidations. The problems of worker protection presented by the bill are not necessarily identical to those presented under other laws. The committee believes, however, that workers for whom a standard of benefits has already been established under other laws should receive equally favorable treatment under the proposed new program. The committee also believes that all workers adversely affected by adjustments effected under the bill should be fully protected in a fair and equitable manner, and that Federal funds should not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers.

The bill, accordingly, contains a specific provision that, in communities where projects are to be assisted under the bill, fair and equitable arrangements, as determined by the Administrator, must be made to protect the interests of affected transit employees. In determining whether arrangements are fair and equitable within the meaning of this provision, the Administrator must act only after consultation with the Secretary of Labor and with his concurrence.

APPENDIX J

PUBLIC UTILITIES COMMISSION

Section 16-319-14. Order of service. The operator of a taxicab shall accommodate patrons in the order of their application for service. Consent of the patron first hiring the taxicab shall be obtained if additional patrons are to be carried.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WESTPORT TAXI SERVICE, INC., *et al.*
Plaintiffs

vs.

WILLIAM T. COLEMAN, JR., *et al.*,
Defendants.

} Civil Action No. B- 76-369

AFFIDAVIT OF CHARLES F. BINGMAN
ACTING URBAN MASS TRANSPORTATION ADMINISTRATOR

DISTRICT OF COLUMBIA, to wit:

This day before the undersigned Notary Public in and for the District of Columbia personally appeared Charles F. Bingman, who, being by me first duly sworn according to law, did on his oath depose and say as follows:

1. The affiant is the duly appointed and acting Deputy Administrator and Acting Urban Mass Transportation Administrator of the United States of America, and has official knowledge of all of the matters and things hereinafter set forth.

2. All of the powers vested in William T. Coleman, Jr., Secretary of Transportation, defendant herein, pursuant to the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. §§ 1601 *et seq.*) (the "UMT ACT") and other statutes authorizing Federal financial assistance to mass transportation, have been officially delegated to the Administrator and his predecessors in office (49 CFR § 1.51).

3. Section 6 of the UMT Act (49 U.S.C. § 1605) authorizes the Secretary of Transportation to "...undertake research, development, and demonstration projects in all phases of urban mass transportation (including the development, testing, and demonstration of new facilities, equipment, techniques, and methods) which he determines will assist in the reduc..on of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban mass transportation needs at minimum cost." Section 6 authorizes the Secretary to ". . .undertake such projects independently or by grant or contract..."

The overriding purpose of projects undertaken pursuant to this section is to produce results which may be applied to other projects in similar urban areas.

4. On April 11, 1975 the Westport Transit District ("Westport Transit") submitted an application to UMTA for a research, development, and demonstration project under section 6 of the UMT Act for a grant of $25,000 to carry out a study to ascertain the feasibility of the development of an integrated system of conventional and paratransit services in the communities of Westport and Weston, Connecticut (a certified copy of this application is submitted as Exhibit "A" and made part of this Affidavit).

5. On June 26, 1975 the Administrator's predecessor approved the project, Project No. CT-06-0007, described in the immediately preceding paragraph (a certified copy of the approval memorandum and letter advising Westport Transit of the approval is submitted as Exhibit "B" and made part of this Affidavit).

6. The study funded by Project No. CT-06-0007 was prepared by ECI Systems, Inc. for Westport Transit, and submitted to UMTA on December 19, 1975 (a certified copy of this study is submitted as Exhibit "C" and made part of this Affidavit).

7. On January 31, 1976 Westport Transit applied for a grant of $610,441 under section 6 of the UMT Act (49 U.S.C. § 1605) to implement the study described in paragraph 4 of this Affidavit by integrating conventional and paratransit services in Westport and Weston. On April 26, 1976 Westport Transit requested a modification of its application to the effect of deleting services in Weston and adding certain other services in Westport, such as demonstrating the utilization of "occasional providers" of paratransit services. The objective of the project, is to develop a comprehensive transportation system through a total integration of conventional and paratransit services operated by a public agency and a private mass transportation operator under contract to the agency, and the project is designed to serve as a model for potential future use nationwide (a certified copy of the project application is submitted as Exhibit "D" and made part of the Affidavit).

8. On July 16, 1976, the Administrator approved an amendatory grant of $610,000 for the project, Project No. CT-06-0007-01, described in the immediately preceding paragraph (a certified copy of the approval memorandum and letter advising Westport Transit of the approval is submitted as Exhibit "E" and made part of this Affidavit).

9. A grant contract between UMTA and Westport Transit was executed on December 16, 1976, committing UMTA to fund and Westport Transit to undertake

the project described in paragraph 7 of this Affidavit (a certified copy of the executed contract is submitted as Exhibit "F" and made part of this Affidavit).

10. Section 12(c) (5) of the UMT Act (49 U.S.C. § 1608 (c) (5)) defines "mass transportation" for purposes of the UMT Act as "transportation by bus, rail or other conveyance, either publicly or privately owned, which provides to the public general or special service on a regular and continuing basis". UMTA has consistently included within this definition any form of collective transportation service which is regularly available to the public; i.e., any service which cannot be reserved for the private and exclusive use of particular individuals or private groups (certified copies of official correspondence expressing this interpretation are submitted as Exhibits "G" and "H" and made part of this Affidavit). Hence, fixed-route bus or rail services and paratransit services such as dial-a-ride, jitney, shared-ride taxi, neighborhood transit, subscription bus service and other types of shared-ride transportation services which are available to the public or to special categories of users (such as elderly and handicapped persons) on a regular basis are considered by UMTA to be "mass transportation services." Services which can be reserved for the exclusive use of individuals or private groups, either by the operator or the first patron's refusal to permit others to be picked up, such as exclusive-ride taxi service, charter services, sightseeing services, employer vanpool programs, car rental services, for-hire limousines and private ambulance service are *not* deemed to be "mass transportation" services for purposes of the UMT Act.

11. As indicated by section 1(a) of the executed Grant Contract (Exhibit F, p.2), no Federal assistance will be used for exclusive-ride taxi service as part of the Project. The only taxi service that the grant will fund will be shared-ride service that will provide complementary service to the fixed route bus service.

CHARLES F. BINGMAN
Deputy Urban Mass
Transportation
Administrator

Taken, Subscribed, and sworn to by Charles F. Bingman before me this 31st day of December 1976.

Notary Public
District of Columbia

My Commission expires May 31, 1977.

APPENDIX I.

Richard H. Bradley, Sworn
Direct Examination by Mr. Golub

[25] THE COURT: All right.

MR. GOLUB: May I proceed?

THE COURT: Yes.

BY MR. GOLUB:

Q As a matter of fact, Mr. Bradley, isn't it a fact that the UMTA approval of your proposed demonstration project includes premium ride taxi as well as shared ride taxi as an available option? Is this the approval?

A This is the approval letter, correct.

Q Referring to paragraph two, second paragraph, does that indicate that one of the available options will be premium ride as well as shared ride service?

A Can I read the sentence?

Q If you can just answer yes or no.

A One of the available options may be premium ride taxi.

* * *

[36] Yes, we are competitive, and I would agree to the same extent that we are competitive with a taxi operator. We assume there is a kind of market out there and we are competing to get a share of that market, but I am simply saying, I am trying to hold back to say there is a distinction between -- it's not the identical service and it's not --

THE COURT: It's not --

THE WITNESS: It's a form of competition in that sense, yes.

THE COURT: Are there any differences as to the subsequent passengers, are there any differences other than the fact that your fare is lower?

THE WITNESS: Correct.

THE COURT: And your customer has to wait until your vehicle is full or at least has all the people going to that general area. I don't suppose you wait there forever.

THE WITNESS: Correct.

THE COURT: But an appropriate interval for people going to that part of town.

THE WITNESS: That's correct.

THE COURT: Whereas the second customer going into Gilbertie's taxi has at least the prospect that he will drive off with

[37] two people.

THE WITNESS: Correct.

THE COURT: And that might be an advantage to customer number two?

THE WITNESS: Correct.

THE COURT: All right.

BY MR. GOLUB:

Q Have you made any projections, Mr. Bradley, concerning the expected revenue from the taxi service provided under the demonstration project in the first year?

A Yes, we have.

Q What is that projection? I think you might look at C-8 of the application.

A Yes, we have.

Q What would that projection be?

A In which year?

Q In the first year of operation.

A I believe total $127,685.00.

Q Approximately $125,000.00, $127,000.00?

A Correct.

Q How about in the second year, do you have a projection for the second year?

A $182,000.00.

Q How about for the third year, if there is a third year?

[38] A 246,000.

Q Do you know from the E.C.I. study conducted what the present revenue is that's brought in by the two existing taxi companies?

A Approximately $200,000.00.

Q Total?

A Total between the two?

Q Would it be fair to say that a goodly portion of their projected revenue would be drawn from the current revenue of the two existing companies?

A Not necessarily.

Q Have you made any projections concerning that?

A As to how much would be drawn from there?

Q Yes.

A No, we have not.

Q On the basis of your knowledge of the transit -- withdrawn. But do you have any knowledge what the maximum revenue drawable from the Westport Community would be for taxi service?

A For all forms of taxi service?

Q Yes. Do you have reason to believe there is a million dollars' worth of taxi business in the Westport area per year?

A No. I have reason to believe, however, based on surveys that we have done of our existing ridership that there is a, if you like, a kind of multi-employer affect. If people choose a transit option they are likely to choose another

[39] transit option.

* * *

[45] A No, we do not. We do not anticipate doubling.

Q You have answered the question. Now, when this private transportation company is formed, am I correct that it's going to be the Westport Transit District that collects the revenues?

A Revenues will be turned over to the district at the end of the day. In that sense, yes.

Q It's the Westport Transit District that will own the vehicles?

A That is correct.

Q It's the Westport Transit District that's going to set the rates?

A That's correct.

Q And it's the Westport Transit District that's going to set the salaries of the drivers?

A No.

Q It's not the Westport Transit District -- haven't you already set the salaries of drivers?

A No, we have not. We have just offered a bid and we invited the bidders to submit to us what the rates will be. There are proposed rates in the plan but they do not exist at the moment other than --

[46] Q Whatever rates there were would they be salaries -- would they be subject to the approval of the Westport Transit District?

A That's correct, they would.

Q In other words, if the transit district felt the rates and salaries to be -- the salaries are not high enough, it would authorize and instruct higher salaries to be paid?

A That could be possible, yes.

[49] Q At any time, Mr. Bradley, during the negotiations that took place with the Gilberties, was there a direct offer to buy their taxi company made?

A By whom?

Q By the Westport Transit District.

A No.

Q As a matter of fact the only negotiations that were conducted involved the Gilberties participating in work for the Westport Transit District in one form or another?

A Correct.

* * *

[50] Q In other words, for the services that this demonstration is supposed to provide, they are losing their corporate identity?

A If you say forming a joint partnership, perhaps that's correct.

* * *

[53] Q Is it your intention to continue this project after the two years demonstration period?

A We would hope that those services could be continued, some of which on a break even basis.

Q Would you look for additional subsidies besides the Federal Government after two years?

A We would like for other sections of the Federal Government for financial assistance.

[54] Q In other words, you hope to continue this project with subsidies if necessary?

A You're asking me my comment, my reaction, and the answer is yes, I hope these services can be continued and expanded.

I am not sure what the judgement will be at the end of the two year period of tin e, whether or not they make sense.

Q As it is now projected did you anticipate that the project will survive beyond two years?

A I think so.

Q For how many years do you think it will survive?

A I couldn't make a judgement.

Q As it's projected how many years do you think it will survive?

A It hasn't been projected beyond three years.

Q If you make it through the year, third year, do you think at that point it will maintain itself for a few more years?

A I would assume so.

Q And based on your knowledge of the projection and your knowledge of the Westport Community do you feel it will make it into the third year?

A At least I hope so. I think so.

APPENDIX M

Michael Angelo Gilbertie, Sworn
Direct Examination by Mr. Silver

[12] Q Since that was granted in 1970, have you, in the last seven years, made an additional application for an increase in the rate structures serving the town of Westport:

A No, we haven't.

Q And has there been any increase?

A Other than a ten cent per trip increase granted to all the taxi companies in the State of Connecticut to offset the increase in the gasoline price in 1970, no, we haven't had any other increase.

[22] Q Mr. Gilbertie, if — what effect would the loss of any more of your ridership have upon your business, the Westport taxi business?

A For all practical purposes, we would be put out of business.

* * *

Q How much did you earn last year for that 75 hour week?

A Ten thousand, four hundred dollars, my salary, plus very minor amount in trips from driving.

Q How much did your brother earn last year?

A The same amount.

Q Does he work the same 75 hours that you do?

A Yes, he does.

[28] Q What percentage — let's call that shared ride, what percentage of your business at the present time is shared ride as opposed to having one passenger who begins a destination and completes a destination?

A Approximately 50 percent.

[29] Q Now, Mr. Gilbertie, if the Westport Transit Authority puts through a plan whereby they pay citizens in the community to pick up other citizens and deliver them, what effect will that have on your business?

A Well, that will just eliminate another source of possible business. We feel that our business is derived from needs that arise in the community and if a person needs a ride and there are other alternatives, then he is less likely to call a taxi and this just provides another alternative for him, so it eliminates another possible source of ridership.

Q How many employees besides yourself and your brother — and your father works with you too, is that correct?

A Yes, he does. He is restricted to dispatching now in the evening. He puts in approximately 50 hours a week.

Q Your father puts in fifty hours a week?

A Yes, he does.

Q How many other employees do you have besides your father, yourself and your brother, Tony?

A Approximately fifteen

* * *

Gilbertie — Cross Examination

[42] Q What taxi cabs did you use:

The same vehicles we used in 1974.

Q The five vehicles?

A That's correct.

Q What salary did you draw?

A Twenty-six thousand.

Q Was that just you and your brother?

A That was divided three ways.

Q How was it divided three ways?

A Approximately ten, five — ten, five and five, if I recall correctly.

[44] BY MR. SAGARIN:

Q Prior to the recess, Mr. Gilbertie, we were examining upon reports of taxi cab operation which you filed with the Public Utilitites Commission Control Authority.

Including in that operation in the income statement there is at the bottom line of that income statement information as to whether or not your company reported or made any profit or lost money during the years in question, is there not?

A Yes, but that refers to the taxi cab operation.

[45] Q In 1969, did you make or lose money?

A I lost money.

Q Approximately $2,700?

A That's correct.

[80] Q Under every proposal presented to you who would collect the fares?

A All the revenues derived would go to the Transport District, Westport.

Q Would you still be operating under your certificate that you got from PUC?

A No, we would still hold our certificate but we couldn't operate under that — we would still be the owners of the certificate but there was no way that we could operate the two operations together.

Q In other words, the proposal that was presented to you was the Westport Transport Authority would be operating the taxi cabs and you would be working for them and dispatch —

MR. SAGARIN: Leading.

A Yes.

Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

No. 77-1700

In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTPORT TAXI SERVICE, INC., ET AL., PETITIONERS

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1700

WESTPORT TAXI SERVICE, INC., ET AL., PETITIONERS

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erred in upholding the decision of the Secretary of Transportation that a taxi business like petitioners', which offers taxi services for the exclusive use of individuals or private groups, is not a "mass transportation company" within the meaning of 49 U.S.C. 1602(e).

1. The relevant facts are concisely stated in the court of appeals' opinion (Pet. App. A-19 to A-24). Respondent Westport Transit District is a governmental entity formed in 1969 by the town of Westport, Connecticut. In 1976 the Transit District applied to the Administrator of the Urban Mass Transportation Administration (UMTA) for a grant of approximately $610,000 to help implement a demonstration mass transportation project. In July 1976 the Administrator approved a grant for a two-year

project. The project envisions a number of new services; the service of principal concern to petitioners is a proposed "shared ride" taxi service to be provided by a number of new twelve-paggenger vans (Pet. App. A-21 to A-22).

Petitioners are licensed by the State of Connecticut to operate an "exclusive ride" taxi service in Westport. They own five conventional taxicabs. The distinguishing feature of their "exclusive ride" license is that they may carry two or more passengers going to different locations only if they obtain the consent of the first passenger. Under a "shared ride" service, in contrast, no passenger may insist that the vehicle be reserved exclusively for his trip (Pet. App. A-22).

Fearing that the Transit District's planned "shared ride" taxi service would harm their enterprise, petitioners brought suit in December 1976, seeking to enjoin the Secretary of Transportation from funding the project. They alleged, *inter alia*, that respondents had not complied with Section 3(c) redesignated as 3(e) of the Urban Mass Transportation Act of 1964, 78 Stat. 303, as amended, 49 U.S.C. 1602(e). Section 3(e) provides in pertinent part that no financial assistance shall be given to a state or local body for "the operation of mass transportation facilities" that would compete with an "existing mass transportation company," unless the Secretary makes certain findings, including findings that the assistance is essential to the program and that, to the extent feasible, private mass transportation companies will be able to participate in the program. Here the Secretary made no such findings because he concluded that petitioners' business is not an "existing mass transportation company" (Pet. App. A-23 to A-24).

The district court ruled that Section 3(e) is not applicable to demonstration projects such as the Westport plan (Pet. App. A-8). The court of appeals found that the section is applicable to demonstration projects, but it held

that, in light of administrative interpretation and practice, as well as the legislative history of the Act, petitioners could not claim the protection of Section 3(e) because they do not operate a "mass transportation company" (Pet. App. A-27 to A-30).[1]

2. The court of appeals correctly concluded that Westport Taxi is not a "mass transportation company" within the meaning of Section 3(e). There is no conflict on that issue or any other reason warranting this Court's review.

For the purposes of determining whether a transportation company is "a mass transportation company" within the meaning of the statute, the Secretary has distinguished between companies that provide a service that may be reserved exclusively by individuals or groups (*e.g.*, charter buses, limousines, and most taxis) and companies that provide a shared-ride service (*e.g.*, ordinary buses). See Bingham Affidavit, Pet. App. A-71 to

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[1]Petitioners also asserted in the courts below that Section 3(d) of the Urban Mass Transportation Act had not been complied with. Section 3(d), 49 U.S.C. 1602(d), requires that an application for UMTA funds include a certification that the applicant has given the public an opportunity for a hearing on the transportation plan, has considered the economic, social and environmental impact of the plan, and has found the plan to be consistent with official goals for the comprehensive development of the urban area. The district court held that, since the Westport plan was a demonstration project, it did not have to comply with this section (Pet. App. A-6 to A-7). The court of appeals reversed and remanded with instructions that an order be entered enjoining the disbursement of federal funds until Westport's application had been amended to include the requisite certification (Pet. App. A-30). The certification was thereafter duly filed and the injunction dissolved (Pet. 15 n. 6). Petitioners do not pursue their claim concerning Section 3(d) here.

A-75; Pet. 21 n. 8. Petitioners' service falls within the former category.[2] The distinction employed by the Secretary is consistent with the common and ordinary understanding of the term "mass transportation" (see *Ernst* v. *Ernst* v. *Hochfelder*, 425 U.S. 185, 199 n. 19) and with the legislative history of the Act.

"Mass transportation" was originally defined by the Act as transportation by bus, rail or other conveyance "moving over prescribed routes." See Section 9(d)(5), 78 Stat. 307. That definition clearly excluded taxi companies, because they do not move over prescribed routes. The definition was expanded by the Housing and Urban Development Act of 1968, Section 702, 82 Stat. 535 to cover transportation by bus, rail or other conveyance that provide a service to the public "on a regular and continuing basis." Despite the broadening of this language, however, the legislative history indicates that the purpose of the change was not to include every form of transportation for hire, but rather was "to allow greater flexibility in developing and applying *new* concepts and systems in urban mass transportation programs" (emphasis supplied). S. Rep. No. 90-1123, 90th Cong., 2d Sess. 76-77 (1968). As the court of appeals noted (Pet. App. A-29), the exclusive taxi service offered by petitioners is not a "new" concept or system.

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[2]Although petitioners characterize their business as providing a "shared ride" service (Pet. 12), they concede that the state regulations governing their service permit additional passengers only with the consent of the first passenger (*ibid.*). Thus, under state law, petitioners must offer a service that may be exclusively reserved by individuals. That is the principal difference between petitioners' business and the shared-ride service proposed by the Transit District.

[3]The present definition, which is codified at 49 U.S.C. 1608(c)(5), provides:

> The term "mass transportation" means transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis.

The Secretary has consistently interpreted the statutory definition as meaning that exclusive ride taxi services are not "mass transportation companies."[4] Because the Secretary's interpretation is reasonable, consistent, and in accord with the legislative history, the court of appeals correctly upheld it. See, *e.g.*, *Zenith Radio Corp.* v. *United States*, No. 77-539, decided June 21, 1978, slip op. 6-7.[5]

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[4]Petitioners err in contending (Pet. 18) that the Secretary's conclusion that their business is not a "mass transportation company" is inconsistent with his determination that the Transit District's proposed services constitute "mass transportation facilities." That claim overlooks the principal distinction employed by the Secretary: namely, that petitioners' taxi services are subject to exclusive reservation, while the Transit District's services are offered on a shared-ride basis.

Petitioners also err in contending (Pet. 22-26) that the Secretary's position is inconsistent with earlier policy statements and practices. Nothing in UMTA's policy statement on paratransit services or in statements of agency officials (cited at Pet. 22-24) suggests that an *exclusive ride* taxi service is a mass transportation company. Indeed, those statements acknowledge that a local taxi service may not provide "mass transporation services" (Pet. 22). And the court of appeals correctly held that the two instances in which UMTA funded private taxicabs companies to perform specialized services to the handicapped and elderly (see 49 U.S.C. (and Supp V) 1612) do not "detrac[t] from the persuasive force of UMTA's interpretation" (Pet. App. A-29, 30 n. 5).

[5]Although petitioners assert (Pet. 4) that UMTA's funding of the Transit District constitutes a "taking" of their property without compensation, the court of appeals correctly rejected that argument (Pet. App. A-24 n. 3).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.

Supreme Court, U. S.
FILED
JUL 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

77-1700

WESTPORT TAXI SERVICE, INC., MICHAEL AND ANTHONY GILBERTIE,
Petitioners

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, WESTPORT TRANSIT DISTRICT, PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

QUESTIONS PRESENTED

A. Were Petitioners Entitled to Freedom from Public Competition Resulting from a Demonstration Project?

B. Did the Hearing Following the Court of Appeals Decision Render Petitioner's Claims Moot?

STATEMENT OF FACTS[1]

Respondent Westport Transit District (WTD) is a government entity formed by Westport, Connecticut in 1969 to organize, coordinate and provide mass transportation services in Westport. Conn. Gen. Stat. §7-273b. Its appointed directors are Paul R. Green, John E. Meyers and Richard Bradley. In April, 1975, the Transit District applied to the federal Urban Mass Transportation Administration ("UMTA") for a $25,000 grant to study the possibility of developing an integrated and coordinated transportation system for the community. The study had two immediate goals: first, to develop a plan for a complete transportation that would utilize and coordinate existing and potential transportation services; second, to design a demonstration project to implement and experiment with various aspects of the plan. Such studies are eligible for funding under 49 U.S.C. §1605 (c). On June 26, 1975, the Administrator of the UMTA, to whom the powers of the Secretary of Transportation under the Act have been delegated, 49 C.F.R. §1.51, approved the study grant. The study was conducted, and a demonstration project was proposed. Early in 1976, the Transit District applied for a grant of roughly $610,000 to implement the project. In July of 1976, the Administrator approved a grant for a two-year project. The basic question raised at the Court of

[1] The Court of Appeals succinctly stated the facts and this recitation is taken largely from that opinion. 571 F.2d. at 699-70.

Appeals was whether certain of the Act's procedural requirements had to be complied with prior to the Administrator's approval of the two-year implementation grant.

Westport Taxi Service, Inc. ("Westport Taxi") is a small taxi company owned by two brothers, Michael and Anthony Gilbertie. It operates under a certificate of public convenience and necessity from the Connecticut Public Utilities Control Authority ("PUCA"). Conn. Gen. Stat. §16-320. The type of service offered by Westport Taxi is known as "exclusive-ride" taxi service and is governed by PUCA regulation §16-319-15, which requires that the consent of the first person to hire a taxicab be obtained before the taxi may take on additional riders. Westport Taxi's "fleet" consists of five aging taxicabs; its financial condition is precarious.

The Transit District's demonstration project has provided several new types of services.[2] Principal among them will be a "shared-ride" taxi service provided with eleven new twelve-passenger vans. Other major elements of the project were special market services for groups such as the handicapped and elderly, transportation brokerage through which all transit and paratransit services in the area would be coordinated, and supplementary fixed route service. The services provided under the demonstration

[2] The transit district commenced operation of the project in April of 1977 following the district court's (Newman, J.) ruling denial of plaintiff's complaint for preliminary and permanent injunction relief.

grant are different from those provided by the plaintiff. No "premium ride" (single rider) service may be provided under the terms of the grant contract or by UMTA policy. The "shared-ride" service provided by WTD contemplates several riders being aboard in the vehicle before it can leave on its run. The plaintiffs, under a Connecticut Public Utility Control Authority regulation, were allowed to carry a second passenger only with the consent of the first.

As contemplated, the operation of the program has been subcontracted to a private paratransit company in accord with statutory and UMTA policy of permitting to the "maximum extent feasible" private participation. The two Westport Taxi operators were favored candidates for the contract and lengthy negotiations took place on this topic. None of WTD's many proposals for participation was accepted by Westport Taxi. The proposals included the operation of the new program as a joint partnership, an offer to Westport Taxi of a management fee, a dispatching fee and a loan to buy out Teddy's Taxi, its competitor, and a proposal that one company buy out the other. If the program ceased after the two-year demonstration period new equipment was to be leased to participants for a dollar a year. Nothing in any plan required the termination of either taxi business during the demonstration period. As the trial found:

> The Transit District not only held public hearings on the project, of which the plaintiffs were aware, but also made every effort to invite and

> encourage the plaintiffs to bid on participation in the project and negotiated with them at length on possible roles of them to play under the demonstration grant. Ultimately the plaintiffs declined to bid on the project. The fact that the negotiations were unsuccessful does not mean that there has been a statutory violation. All the statute (49 U.S.C. §§1602(e) and 1603) requires is encouragement of private participation "to the maximum extent feasible." It does not allow private transit operators to write their own ticket.

Following the district court adjudication, the demonstration project began. It has continued and is continuing to operate. Petitioner's competitor, Teddy's Taxi, opted to participate in the program and has provided the services contemplated by the grant.

When the Court of Appeals ruled that formal hearings and findings were required even for demonstration projects, a hearing was held on February 15, 1978 in which there was participation by petitioner's counsel. On February 27, UMTA approved the memorandum of its Associate Administrator for Transportation Management and Demonstrations and found, **inter alia:**

1. adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and fair consideration has been given to the preservation and enhance-

ment of the environment and to the interest of the community in which the project is located, and

2. no adverse environmental effect is likely to result from the project; and
3. the project to the maximum extent feasible provides for participation of mass transit companies. (See Appendix, attached hereto.)

On April 13, 1977 the court denied petitioner's requests for preliminary and permanent injunctive relief. Judgment was rendered on April 18, 1977 and petitioners appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals heard argument on October 5, 1977 and rendered its decision on January 24, 1978, reversing the district court in part, affirming in part and remanding with instructions. Petitioner's motion for a rehearing was denied on February 28, 1978.

REASONS FOR DENYING WRIT

A. The Decision Below Followed An Unbroken Line Of Authority That Petitioners Had No Entitlement To Freedom From Public Competition And In Any Event There Has Been Statutory Compliance.

Both the district court and the court of appeals rejected petitioner's contention that injury to business resulting from the demonstration project services would amount to a taking. 571 F.2d at 700, n.3. It is It is well established, as petitioners for the first time recognize, Petition, p. 30, that there is no right to be

free from governmental competition. See *Tennessee Elec. Power v. T.V.A.*, 306 U.S. 118, 138-39 (1939). The argument is here based on a statutory right under 49 U.S.C. §1602 to be free from competition in absence of compliance with §1602(c). Compliance means hearing and findings.

The Second Circuit and the district court essentially reached the same result for different reasons. Judge Newman found that "the evidence presented by the parties shows that the statutory policy of providing private participation has been fully recognized and taken into account, but held hearings were not required for this *demonstration* project." More importantly he found that taking issue was clearly not a basis for injunctive relief. He pointed out that the remedy for any compensable taking was compensation, not injunction.

Judge Meskill approached the issue differently. He held that plaintiffs were not a "mass transportation company" within the meaning of §1602(e) and therefore were not entitled to a hearing. His reliance on the district court findings, the interpretations given to the definition of "mass transportation" by UMTA, the legislative history of the Act and the administrative actions under the Act, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944) was an appropriate way to resolve the definitional problem and raises no issue worthy of this court's review.

Moreover, this issue is moot. Even if petitioner taxi company were held to be a mass transportation company within the Act, the only remedy would be

a 1602(e) hearing to determine if there were "participation of private companies to the maximum extent feasible." That hearing has been held.

Following the February, 1978, hearing that precise finding even though not required by the Act was made. (Appendix pp. 3a-4a) Indeed Judge Newman had found compliance with the statutory purpose even though he held that hearings were not required.

Thus, further hearings are neither needed nor useful. The demonstration project is scheduled to end in April, 1979.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Westport Transit District,
Paul R. Green
Richard Bradley
John E. Meyers, *Respondents by*

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed this day postage prepaid to Richard Silver and David Golub, 733 Summer Street, Stamford, and United States Attorney, 20 Orange Street, New Haven, and Glenn Wasserman, UMTA, 407th St. S. W., Washington, D. C.

By _____
J. Daniel Sagarin

APPENDIX

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION

DATE: FEB 23 1978

In reply refer to:

SUBJECT: Amended Project Approval: Westport Connecticut CT-06-0007-01

FROM: Associate Administrator for Transportation Management and Demonstrations UMD-1

TO: Administrator UOA-1

I am submitting this amended approval memorandum pursuant to the recent decision by the Second Circuit Court of Appeals in the case titled Westport Taxi Service Inc. v. Brock Adams, Docket No. 77-6074 (2d Cir. decided Jan. 24, 1978). As you know, the Court held that there had been a failure to comply with the provisions of section 3(d) of the Act and sent the case back to the district court to enter an injunction against "any further expenditure of federal funds on the demonstration project...pending the amendment of the Transit District's application so as to contain the requisite certification [that public hearings have been held] and pending the approval of the amended application by the UMTA Administrator." To date, no injunction has been entered. However, we put an administrative hold on any further disbursement of funds under the Westport project pending action on this amended approval memorandum. To assist in your review of this amended approval menorandum, I have attached a copy of the original approval memorandum dated June 29, 1976.

Public Hearing:

Although a public hearing for the Westport project was held prior to the Project's original approval, no transcript of that hearing was made as necessitated by section 3(d). Thus, the grantee, Westport Transit District, held another public hearing on February 15, 1978, following fourteen days notice by publication in the newspaper. The public hearing conformed in all respects to the requirements of section 3(d), and the certificate required under that section together with the hearing transcript has been made a part of the application. A copy of the public hearing notices, hearing transcript, and certification are attached to this memorandum for your review.

Section 14:

When a public hearing under section 3(d) is held for a proposed project, some of the provisions of section 14 of the Urban Mass Transportation Act apply. Specifically, section 14(b) requires a review of each hearing transcript "to assure that an adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and that the project application includes a detailed statement on:

1. the environmental impact of the proposed project,
2. any adverse environmental effects which cannot be avoided should the proposal be implemented,
3. alternatives to the proposed project, and
4. any irreversible and irretrievable impact on the environment which may be involved in the proposed project should it be implemented."

The requirements of section 14(b) have clearly been met. The hearing transcript discloses that all parties with any economic, social, or environmental interest were afforded an opportunity to present their views. In addition, Westport Transit District submitted additional information on the environmental impact of the project. That additional information conforms in all respects with the requirements of section 14(b), and confirms our original judgment that no adverse environmental effect is likely to result from the project. In fact, the information submitted thus far shows that the project may have a favorable impact on the environment by reducing automobile usage.

One other matter under section 14 must be addressed. Section 14(c) of the Act requires that an "application for assistance under section 3" (emphasis added) shall not be approved unless written findings are made with respect to the adequacy of the public hearing and with respect to the environmental impact of the proposed project. Since the Westport project is a demonstration under section 6 and not a project under section 3, it would appear that section 14(c) need not be adhered to. However, in a footnote to the Second Circuit's opinion, the Court stated that the necessity of compliance with the Act's hearing requirement "triggers" the requirements of section 14(c).

The Chief Counsel's Office has informed us that they interpret this footnote to be a typographical error. That Office feels the Second Circuit intended to state that the Act's hearing requirment "triggers" the requirements of section 14(b), discussed above, and not section 14(c). Nevertheless, in light of the Court's footnote, we feel that it would be prudent in the case of this project to make the findings under section 14(c). Thus, I recommend that by signing this approval memorandum you find that:

1. adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and fair consideration has been given to the preservation and enhancement of the environment and to the interest of the community in which the project is located, and

2. no adverse environmental effect is likely to to result from the project.

Section 3(e):

As you know, the Second Circuit also held that section 6 demonstration projects are not exempt from the requirements of section 3(e) of the Act. However, the Court held that the plaintiff, Westport Taxi, was not entitled to the protections of section 3(e) since it is not a private mass transportation company within the meaning of the Act. Therefore, the Court did not specifically require that we make the findings that would normally be required under section 3(e). 1/

At the February 15, 1978 public hearing, a private mass transportation company, Cross Country Coach, appeared and voiced an objection to the Westport project. Cross Country Coach provides inter-city service between New Haven and Norwalk with stops in the cities in between, including Westport. Neither the service provided nor the equipment used by Cross Country Coach in its inter-city transportation is comparable to the service or equipment associated with the Westport demonstration project. While Cross Country does not operate closed door within Westport, its service is almost exclusively inter-city. Thus, the service provided by Westport is complementary to rather than competitive with or supplementary to the service provided by Cross Country.

In light of the appearance of Cross Country Coach at the public hearing, we feel it would be prudent to make the findings under section 3(e) in this amended approval memorandum. Thus, under subsection 3(e)(1), I recommend that by signing this approval memorandum you find that the Westport project is essential to a program, proposed or under active preparation,

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1/ Of course, even if Westport taxi were held to be a private mass transportation company there would be a clear basis for making the section 3(e) findings since one of the basic purposes of the project was to involve private enterprise and Westport Transit District went out of its way to attempt to involve Westport Taxi in the project.

for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area. The basis for this finding is a favorable comment on the project by the Southwestern Regional Planning Agency, the local A-95 clearinghouse.

Under subsection 3(e)(2), I also recommend that you find that the project to the maximum extent feasible provides for the participation of private mass transportation companies. The basis for this finding is discussed above.

Because no franchises or property of an existing mass transportation company will be acquired, subsection 3(e)(3) is not applicable.

As noted in the original approval memorandum, the Secretary of Labor has certified the terms and conditions of the protective arrangements required under section 13(c) of the Act.

On the basis of the discussion in this memorandum and its attachments, I recommend that you approve the amended application.

Robert H. McManus

Approved: _____ Date: 27 Feb 1978
Richard S. Page

Attachments